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No. 07-

IN THE

Supreme Court of the United States

COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner,

v.

RICHARD A. LEVIN
TAX COMMISSIONER OF OHIO
Respondent.

On Petition for a Writ Of Certiorari to the Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

CARRIE J. HIGHTMAN
STEPHEN R. MELTON
KENNETH W. CHRISTMAN
NiSource Corporate Services Co.
801 E. 86th Avenue
Merrillville, IN 46410
(219) 647-6047

DOUGLAS R. COLE*
**Counsel of Record*
MARYANN B. GALL
PHYLLIS J. SHAMBAUGH
JONES DAY
P.O. Box 165017
Columbus, OH 43216-5017
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Interstate natural gas pipeline companies, on the one hand, and local distribution companies, on the other, both use functionally identical pipeline equipment to directly compete in providing many natural gas services in Ohio, but do not directly compete with regard to every service that each offers. Ohio's personal property tax scheme assesses the pipeline equipment at 88% of true value when it is owned by an interstate pipeline company, but at only 25% of true value when the functionally identical equipment is owned by a local distribution company, providing a distinct and systematic competitive advantage to the local distribution companies with regard to those services for which both types of companies compete. This tax scheme gives rise to the following question:

> Are companies that use functionally identical equipment to offer directly competing services in some, but not all, of the markets they serve "similarly situated" for Commerce Clause purposes, so that it violates the Commerce Clause to tax the equipment at a higher rate if it belongs to an interstate company and a lower rate if it belongs to a local distribution company?

PARTIES TO THE PROCEEDING

The petitioner is Columbia Gas Transmission Corporation. The respondent is Richard A. Levin, the Tax Commissioner of the State of Ohio.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioner is a wholly-owned subsidiary of NiSource Inc. No publicly-held company owns more than 10% of the stock of NiSource.

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PETITION FOR WRIT OF CERTIORARI

Columbia Gas Transmission Corporation respectfully requests that the Court issue a writ of certiorari to the Supreme Court of Ohio.

OPINIONS BELOW

The decision of the Ohio Tax Department is unreported and is attached at Pet. App. 69a–77a. The decision of the Ohio Board of Tax Appeals is unreported and is attached at Pet. App. 39a–68a. The Ohio Supreme Court's decision is reported at 117 Ohio St. 3d 122 (2008), and is attached at Pet. App. 1a–38a.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1257(a). The Ohio Supreme Court entered its judgment, in which it decided important matters of federal law, on February 14, 2008. The petition was originally due on May 14, 2008. On April 25, 2008, petitioner timely filed a request for an extension of time to file this petition until June 13, 2008. On April 30, 2008, Justice Stevens granted the extension. Petitioner filed this petition before June 13, 2008.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Commerce Clause, Article I, § 8 of the United States Constitution which provides, in pertinent part, that: "The Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

STATEMENT

Natural gas heats homes, cooks food, powers industrial equipment, generates electricity, and, more recently, even fuels transportation. Ensuring the efficient delivery of natural gas is an issue of national importance. This case involves a Commerce Clause challenge to a state tax scheme that directly discriminates against interstate commerce in a way that threatens to stymie the development of an effective nationwide natural gas transportation infrastructure. In particular, Ohio taxes natural gas pipeline equipment that is owned by an interstate pipeline company at a rate that is more than three times greater than the rate that is charged if the same equipment is owned by a local distribution company ("LDC").

In upholding this discriminatory state tax scheme, the Ohio Supreme Court adopted a view of the dormant Commerce Clause that conflicts with this Court's precedent and with the decision of at least one other state supreme court. In particular, the court below concluded that it was not enough that Petitioner (an interstate pipeline company) had shown direct competitive harm in the various markets in which interstate pipeline companies directly compete with LDCs in Ohio. Rather, the court found that in order to make out a Commerce Clause claim interstate pipelines must be able to show that they compete with LDCs in one particular market—the market for direct deliveries to residential customers. Any other competition, the Ohio court held, was simply irrelevant for Commerce Clause purposes.

The court purported to rely on *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), as the basis for this result. In fact, however, the Ohio Supreme Court's per se "you must show that both entities compete in the residential market" requirement contradicts both *Tracy's* language and its logic. Nor can the Ohio court's approach be squared with a recent Kansas Supreme Court decision interpreting *Tracy* in the pipeline context.

Even more troublingly, the decision below provides states virtual impunity to discriminatorily favor LDCs. Because of the prohibitive costs of installing parallel natural gas distribution systems in cities and towns, LDCs will almost always have a natural monopoly on the vast majority of residential transportation service. Thus, a rule that makes significant competition for residential transportation services a necessary prerequisite to a Commerce Clause violation gives states a blank check, both as to discriminatory taxation and (presumably) as to other forms of discriminatory regulation as well.

The potential for such unchecked discrimination threatens to inhibit the development of the nationwide natural gas infrastructure necessary to meet the nation's growing energy needs. Interstate pipelines companies will understandably be leery of spending billions of dollars building new lines, only to find themselves left to compete with local companies on a tilted playing field. And that in turn could well lead to a balkanization of natural gas markets in direct contravention of the longstanding and oft-repeated federal goal of creating and maintaining competitive *nationwide* natural gas markets. Accordingly, Columbia Gas Transmission

Corporation ("Columbia Transmission") respectfully petitions the Court to grant a writ of certiorari and reverse the decision below.

A. The Natural Gas Industry Has Evolved—Local Distribution Companies No Longer Have Captive Customers For Whom They Act As Sole Source Suppliers, And Local Distribution Companies Directly Compete With Interstate Pipeline Companies In Myriad Ways.

Historically, the natural gas delivery industry has included two discrete transportation components. Interstate pipeline companies, such as Petitioner, purchased gas from producers, transported that gas through their pipelines (often across the country) and sold the gas to so-called local distribution companies ("LDCs") at FERC-established rates. See *Tracy*, 519 U.S. at 283-84, and sources cited therein (describing history and development of natural gas industry). These sales were often referred to as "bundled" sales, because the price included both the cost of the gas itself and the cost of transporting that gas to the LDC.

The LDCs in turn sold and transported that gas through their local distribution network to end-user customers, again in the form of a bundled product comprised of the natural gas itself plus the delivery service. Id. The LDCs typically had a local monopoly on end-use distribution in certain geographic areas, but states imposed rate regulations limiting what LDCs could charge for this bundled product, essentially providing the LDCs, like other regulated utilities, a form of cost-plus pricing. Recent regulatory changes, however, have fundamentally changed the face of the natural gas business,

substantially increasing the competition between interstate pipeline companies and LDCs, and also bringing competition to the formerly captive LDC customer base.

1. **Beginning in 1978, Congress largely deregulated the interstate natural gas market.**

In the Natural Gas Policy Act of 1978 (the "NGPA"), Congress began taking steps to increase competition in the natural gas industry, by phasing out the regulation of wellhead prices charged by producers, and encouraging interstate and intrastate pipeline companies to transport natural gas for third parties. *Tracy*, 519 U.S. at 283. The Federal Energy Regulatory Commission ("FERC") continued that process in a series of decisions culminating in Order No. 636, which required interstate pipeline companies to offer gas transportation service on an "unbundled" basis. Id. at 284. As a result, the interstate pipeline companies stopped making wholesale sales of natural gas to LDCs, and began functioning solely as common carriers, using their pipelines to transport gas that LDCs and other customers had acquired directly from producers or other third-party suppliers.

Moreover, the nature of the interstate pipelines' customers changed. Before deregulation, the interstate pipeline companies sold virtually all of their gas to LDCs. Id. at 283. After deregulation, interstate pipeline companies, such as Petitioner, also started selling transportation services to large industrial users that purchased the gas directly from natural gas producers, and then directly connected to the interstate pipeline to receive the gas, rather than

receiving it through the local LDC's distribution network. Id. at 284.

2. Beginning in 1997, Ohio largely deregulated the intrastate natural gas marketplace, and as a result LDCs no longer act as sole-source suppliers to a captive customer base.

Despite these changes in the interstate transportation market, however, the LDCs in Ohio largely continued to operate as they always had, at least with regard to residential customers. To be sure, the LDCs now competed with interstate pipeline companies in selling natural gas transportation services to large industrial users, but the bulk of their business consisted of monopoly sales of the bundled product (i.e., gas plus transportation) to their captive end-user base at a state-regulated rate. Ohio Supreme Court Supp. ("Supp.") at 9-10; 576.

Beginning in 1997, however, Ohio undertook dramatic regulatory changes in the local natural gas distribution market. In particular, the Ohio Public Utility Commission approved LDC "customer choice" programs, through which LDCs unbundled their products—in essence offering access to their distribution networks to competing natural gas suppliers on a common carrier basis. Supp. at 225-26. See also Supp. at 10; 570. Under these programs, consumers were free to purchase their gas from any natural gas marketer or supplier, typically including the LDC, which continued to serve as one of the suppliers for the area. Supp. at 10; 569-70. The consumers then paid a separate transportation

charge to their LDC to transport the natural gas to their home or business. Id.

As a result, much of the LDCs' throughput is now "transportation only." That is, the LDCs' customers purchase their gas from a non-LDC supplier, and use the LDC only for transportation services. To illustrate this, in 1986 only 20% of the gas that LDCs transported through their pipelines in Ohio was carried on a "transportation only" basis. Supp. at 228. By 2005, however, 60% of the gas shipped, Supp. at 228, and at least 50% of the LDCs' residential customers, were "transportation only." Supp. at 118.

More recently, one Ohio LDC, Dominion East Ohio, has requested permission from the Ohio Public Utilities Commission to exit the commodity business entirely and, instead, operate solely as a transport company for its end users. Supp. at 10. If the application is approved, all of the natural gas that moves through that LDC's pipelines would be transportation only, just like the natural gas that moves through interstate pipelines.

In short, Ohio's LDCs no longer act as monopoly sellers offering a bundled product to a captive customer base. Rather, the LDCs are one of many suppliers selling natural gas to customers in a competitive market. To be sure, the LDCs still retain some vestigial obligations from their time as a monopoly supplier, such as an obligation to serve as a provider of last resort. Pet. App. 26a. But the fundamental nature of the residential gas market has changed, replacing the captive-user model with a competition-based market system.

3. Deregulation has led to dramatically increased competition between LDCs and interstate pipeline companies in Ohio.

These dramatic changes in the market have also resulted in greater and ever increasing competition between LDCs and interstate pipeline companies. With regard to the natural gas that is produced and sold in Ohio, of course, the LDCs and interstate pipeline companies like Petitioner can directly compete for transportation services from the wellhead to the delivery point, whether that delivery point is a large industrial direct connect user or another LDC. See, e.g., Supp. at 65-67. Indeed, the record below showed a variety of areas in Ohio where such competition is not merely theoretically possible, but is in fact occurring. Supp. at 7; 69-70; 228-30; 576. The record also showed that LDCs and interstate pipelines directly compete in linking interstate transmission lines to local distribution areas, and in linking distinct distribution areas. Supp. at 443; 449. In all of these activities, customers may choose to move their natural gas through pipelines owned by interstate pipeline companies, or instead through similar pipelines owned by LDCs.

Similarly, as the court below acknowledged, LDCs and interstate pipeline companies also compete for other natural gas related services. Pet. App. at 25a. One example is natural gas storage, in which customers (typically large industrial customers) pay the LDC or interstate pipeline company to ship natural gas to underground sandstone formations where the gas can be stored for delivery at a later time. Supp. at 8; 74-75; 229-30. Another example of a competitive service is natural gas gathering, which

refers to the process of collecting natural gas from the wellhead and preparing it for transportation. Supp. at 11; 451-52. With regard to both types of activities, interstate pipelines and LDCs use functionally identical equipment to directly compete with one another.

B. Ohio's Personal Property Tax Scheme

Ohio imposes a personal property tax on businesses. The tax is computed by multiplying the applicable tax rate (typically expressed as a mill rate) against the assessed value of the company's personal property. Accordingly, the higher the assessed value, the higher the tax paid.

With regard to pipeline equipment, Ohio's tax code specifies two different assessment rates depending on whether the pipeline equipment is owned by a "natural gas company" or a "pipe-line company," both of which are statutorily defined terms. The statutes define a natural gas company as any company that is "engaged in the business of supplying or distributing natural gas for lighting, power, or heating purposes to consumers within [Ohio]." OHIO REV. CODE ANN. § 5727.01(D)(4) (West 2007). A "pipe-line company," on the other hand, is defined as any company "engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partially within this state." OHIO REV. CODE ANN. § 5727.01(D)(5) (West 2007).

Property belonging to a "natural gas company" is assessed at 25% of true value. OHIO REV. CODE ANN. § 5727.111(C) (West 2007). Property belonging to a "pipe-line company," by contrast, is assessed at 88% of true value. OHIO REV. CODE ANN. § 5727.111(D) (West 2007). Thus, a "pipe-line company" pays over

three times the tax that a "natural gas company" pays on the same kind of pipeline equipment.

C. Columbia Transmission's Challenge To The Discriminatory Tax Scheme

The Ohio Department of Taxation assessed Columbia Transmission's property at the 88% rate, contending that Columbia Transmission qualified as a "pipe-line company." Pet. App. 2a. Columbia objected to that assessment, claiming that while it met the statutory definition of a "pipe-line company," it also met the definition of "natural gas company," and that, as it met both definitions, it was free to elect either classification. Pet. App. 55a. The Department rejected that contention, however, asserting that (1) while Columbia admittedly supplied natural gas to consumers in Ohio—i.e., the statutory definition of a natural gas company—Columbia's *primary* business was transporting natural gas, and (2) that the statutory definition tacitly included a "primary business" test. Pet. App. 3a–4a, 59a.

Columbia appealed the Department's determination to the Ohio Board of Tax Appeals, pressing various statutory and constitutional claims, including a dormant Commerce Clause claim.[1] Pet. App. 43a–44a. The Board reversed the Department's determination on statutory grounds, finding that Columbia met the statutory definition of a "natural

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[1] Ohio law precludes the Board of Tax Appeals from considering constitutional claims. See *MCI Telecomms. Corp. v. Limbach*, 68 Ohio St.3d 195 (1994). Taxpayers are nonetheless required to present their constitutional claims to the Board, or those claims are deemed waived. Id. at 197-99.

gas company" and thus was entitled to the lower assessment rate. Pet. App. 66a–67a.

The Department appealed the Board's ruling to the Ohio Supreme Court, again claiming that Columbia Transmission was a "pipe-line company" rather than a "natural gas company." Pet. App. 4a. In response, Columbia argued, inter alia, that the Department's approach results in LDCs uniformly receiving the preferable tax treatment, and interstate pipeline companies uniformly being taxed at the higher rate. It further noted that this tax differential imposes a competitive disadvantage on interstate pipeline companies in the various markets, and with regard to the various services, in which they compete head to head with LDCs. Accordingly, Columbia argued that, if interpreted to systematically disadvantage the interstate pipelines in their competition with LDCs, the tax scheme would violate the dormant Commerce Clause. Pet. App. 19a.

The Ohio Supreme Court reversed the Board of Tax Appeals and imposed the higher assessment rate. Pet. App. 37a. In doing so, the court rejected Columbia's Commerce Clause argument. Pet. App. 29a. The court based its rejection of that argument on its determination that interstate pipeline companies and LDCs are not "similarly situated" for Commerce Clause purposes. Pet. App. 22a. In reaching that conclusion, the court acknowledged that the question of whether groups are "similarly situated" under the Commerce Clause typically turns on whether there is "actual or prospective competition between the supposedly favored and disfavored entities in a single market." Id. And the court did not dispute that the

interstate pipelines and LDCs competed with regard to various services. Pet. App. 25a.

The court read this Court's decision in *GM v. Tracy*, however, as essentially adopting a special dormant Commerce Clause rule for natural gas markets, under which it is not enough for a company to show that it competes with LDCs in one or more markets, but rather the *only* relevant question is whether the company competes with the LDC *in the residential distribution market*. Pet. App. 25a–27a, 28a. In the Ohio court's view, *Tracy* means that no other competition matters: "In conclusion, Columbia's failure to show that it is in direct competition with Ohio LDCs *in the residential market* proves fatal to its dormant Commerce Clause claim." Pet. App. 29a. Of course, as LDCs have a natural monopoly on residential distribution (given the expense of building a competing distribution network in cities), the Ohio Supreme Court's ruling means that states will be free to provide their in-state LDCs with a competitive advantage over interstate pipeline companies in the many competitive markets in which both operate.

Given the impediments that such discriminatory taxation creates for Columbia Transmission's ability to compete with LDCs, Columbia Transmission now respectfully urges the Court to grant certiorari to review the Ohio Supreme Court decision.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH *GM v. TRACY* AND THE COURT'S COMMERCE CLAUSE JURISPRUDENCE IN GENERAL.

The Ohio Supreme Court, while purporting to apply *GM v. Tracy*, failed to appreciate the context in which that case was decided. As a result, its decision, far from finding justification in *Tracy*, actually conflicts with the Commerce Clause principles that *Tracy* elucidates. In particular, *Tracy* created a narrow exception to the Commerce Clause's general prohibition on state taxes that create a competitive advantage for local companies—an exception the Court based solely on the unique role that local distribution companies then played as the monopoly supplier of natural gas to a captive residential customer base. That role has now ended, and thus so should the exception. The court below, however, read *Tracy* to permanently engraft into the Commerce Clause permission for states to favor local distribution companies in their taxation schemes. That result conflicts with *Tracy's* reasoning and this Court's dormant Commerce Clause jurisprudence generally, serves to improperly ossify a Commerce Clause jurisprudence that must be free to react to market changes, and threatens to forestall development of necessary natural gas infrastructure in direct contravention of Congress's stated policy goals.

A. The Commerce Clause prohibits discrimination between "similarly situated" entities.

It is well-settled that states cannot use their tax systems (or other regulatory systems) to engage in "economic protectionism—that is, regulatory

measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. v. Limbach,* 486 U.S. 269, 273 (1988). Stated alternatively, "[t]he negative or dormant implication of the Commerce Clause prohibits state taxation, or regulation, that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace." *Tracy,* 519 U.S. at 287 (quotations and citations omitted). To that end, "[a] discriminatory law is virtually per se invalid..." *Dep't. of Revenue of Ky. v. Davis,* ____U.S. ____, Slip. Op. at 8 (May 19, 2008) (quotations and citations omitted).

As this Court noted in *Tracy,* however, the "threshold question," see 519 U.S. at 299, is whether the two differentially treated companies are "similarly situated" for Commerce Clause purposes. This is so because "[c]onceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." Id. at 298.

The *Tracy* Court defined "substantial similarity," in turn, by reference to the goals that the Commerce Clause is designed to achieve. In particular, the Commerce Clause seeks to foster free competition in order to protect "markets and participants in markets." Id. at 300. Substantial similarity, then, turns on whether the two entities compete in at least one market—"in the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply." Id. Litigants seeking to lay claim to

Commerce Clause protection, then, must show that they have suffered a competitive harm as a result of a preferential advantage conferred by the state.

B. *Tracy's* determination that LDCs were not "similarly situated" to independent gas marketers was driven exclusively by the fact that LDCs served as monopoly suppliers to a captive residential market, a fact that is no longer true.

In *Tracy*, the Court considered the application of these principles to an Ohio sales tax that exempted LDCs, but not interstate natural gas marketers, from sales tax liability for sales of natural gas. The way the natural gas market was structured during the late-80's timeframe (the period at issue in *Tracy*, see id. at 282 n.1), the two groups directly competed in selling natural gas in unregulated transactions at market-based prices to large industrial companies. But the LDCs at that time still served as monopoly providers of bundled gas sales at regulated prices (and regulated terms) to the noncompetitive, captive residential market. Id. at 302-03. In ascertaining whether the two groups were similarly situated, the Court thus had to determine whether to "accord controlling significance to the noncaptive market in which [the two groups] compete, or to the noncompetitive, captive market in which the local utilities alone operate." Id. at 303-04.

The Court focused on the latter market and thus determined that the groups were not similarly situated for Commerce Clause purposes, but it did so based exclusively on concerns about the impact that its ruling would have on *the LDCs' role as monopoly suppliers to a captive residential market*—a condition

that no longer exists in Ohio. In essence, the Court concluded that the LDCs' status as monopoly suppliers of bundled gas to a non-competitive, captive market required an exception to the typical Commerce Clause rules that would otherwise apply.

To that end, the Court noted both the long history of state regulation of the non-competitive captive market, as well as the tacit congressional approval for those state regulatory regimes—observing that "Congress has done nothing to limit its unbroken recognition of the state regulatory authority that has created and preserved the local monopolies." Id. at 304-05. Given this history, the Court recognized "[t]he continuing importance of the States' interest in protecting the captive market from the effects of competition," and concluded that this was a "legitimate state interest" that was "compatible with the Commerce Clause." Id. at 306. Cf. *Oregon Waste Sys., Inc. v. Dep't. of Env't Quality*, 511 U.S. 93, 101 (1994) (observing that even discriminatory laws can survive if they "advance[ ] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives"). (quotation and citation omitted).

Similarly, the Court noted that it lacked the institutional expertise to correctly assess the impact that applying the Commerce Clause's typical non-discrimination standard would have on LDCs' provision of the bundled service to the captive market. Observing that "the Court is institutionally unsuited to gather the facts upon which economic predictions can be made," 519 U.S. at 308, the Court concluded that "[t]he most we can say is that modification of Ohio's tax scheme could subject LDCs

to economic pressure that in turn could threaten the preservation of an adequate customer base to support continued provision of bundled services to the captive market." Id. at 309. Based on such concerns, the Court concluded that the LDCs, which principally sold "noncompetitive bundled gas," were not similarly situated to interstate suppliers.

In short, the *Tracy* Court used the "substantial similarity" label to balance the competitive harms that the discriminatory tax would cause marketers in the competitive markets, against the States' "legitimate interest" in preserving and protecting the non-competitive, captive residential market. And the Court found that the legitimate interest in protecting the latter would in effect offset what would otherwise have been a Commerce Clause violation. Cf. *Oregon Waste Sys.*, 511 U.S. at 101 (discrimination acceptable if it advances a "legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives").

C. The decision below expands *Tracy* far beyond its original bounds and creates a blank check for State discrimination in favor of LDCs.

The court below here, while purporting to rely on *Tracy*, arrived at a result that is fundamentally inconsistent with *Tracy's* underlying economic rationale. In particular, failing to appreciate the importance of the "noncompetitive, captive market," 519 U.S. at 303, to *Tracy's* analysis, the court below interpreted the case to create a per se rule that two competitors in the natural gas industry cannot be "similarly situated" for Commerce Clause purposes unless they directly compete against each other in the residential market. The court reached that result

even though Ohio's residential market is no longer captive, but is instead fully competitive. The court below thus transformed *Tracy's* subtle balancing test into a blunt instrument that allows virtually unchecked discrimination in favor of LDCs.

Importantly, the Ohio Supreme Court did not dispute that LDCs and interstate pipeline companies (such as Petitioner) do directly compete with regard to a variety of natural gas services. According to the court, however, any such competition was of no moment in the Commerce Clause analysis for one reason—as a matter of law the two entities could not be "similarly situated" unless both entities competed in the residential natural gas market: "In conclusion, Columbia's failure to show that it is in direct competition with Ohio LDCs in the residential market proves fatal to its dormant Commerce Clause claim." Pet. App. 29a.

The court reached this result even after recognizing that the residential market in Ohio is now fully competitive, and the LDCs have unbundled gas and transport services. In the court's words, "LDCs now offer both bundled and unbundled services and, as Columbia notes, they can sell natural gas, transportation service, and storage service separately." Pet. App. 27a. According to the court, though, it was not enough to escape *Tracy's* shadow that the LDCs' local market was now competitive, rather the competition in that market had to come *from the interstate pipeline companies themselves* in order to make out a Commerce Clause violation:

> Nevertheless, the main competitors of LDCs in the residential and small-business markets are not interstate-pipeline companies. Rather,

> independent and LDC-affiliated marketers compete with LDCs for commodity sales in this market. Moreover, marketers largely rely on the LDC's distribution network to deliver their natural gas to end-use customers. In other words, interstate-pipeline companies do not compete for residential and small-business customers for either natural gas sales or transportation services.

Id.

This requirement—that the residential market must be competitive and that the competition must come directly from the interstate pipelines themselves—goes well beyond *Tracy*. As noted above, *Tracy* rested on concerns regarding the "noncompetitive, captive market," a market that no longer exists. Ohio's residential consumers now have the ability to pick their natural gas supplier from a host of competitors. Indeed, at least one LDC has sought to exit the supplier business entirely and act solely as a transport company, meaning it would not sell the bundled product *at all*. Supra at 7. Accordingly, the "legitimate state interest" that *Tracy* allowed to insulate a discriminatory tax from Commerce Clause scrutiny is no more and cannot be invoked as a basis for sustaining Ohio's discriminatory property tax scheme here.

Absent *Tracy's* protection, though, the decision below directly contradicts the Court's well-settled Commerce Clause principle that States may not "tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the state." *Armco, Inc. v. Hardesty*, 467 U.S. 638, 642 (1984). See also, e.g., *Oregon Waste Sys.*,

511 U.S. 93, 99 (1994) (calling this principle "well established"); *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 581 (1997) (quoting *Armco*); *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) (same). The Ohio tax plainly imposes just such a forbidden tariff.

Although most of the natural gas produced in the United States comes from the states of Texas, Oklahoma, and Louisiana, a significant amount of gas is produced in Ohio. Supp. at 679. In fact, Ohio ranks 18th among the states in natural gas production. Supp. at 233. Therefore, when Ohio LDCs or other natural gas suppliers acquire gas for resale to residential and other retail customers, they have a choice; they may purchase gas from local, Ohio producers or from out-of-state producers or suppliers. Supp. at 456. In many instances, given the configuration of natural gas pipelines in Ohio, it is possible to transport locally-produced, Ohio gas from the point of acquisition to a customer's home or business using only the intrastate facilities of one or more LDCs. Supp. at 229; 450-453; 687. Purchases of gas from out-of-state suppliers for consumption in Ohio, on the other hand, as well as sales of Ohio gas to out-of-state purchasers, must necessarily be transported by an interstate pipeline company. Thus, gas that remains "entirely within the state" can be transported at a lower effective tax rate than gas that crosses Ohio's borders, effectively imposing a tariff and also granting Ohio's LDCs a competitive edge in their competition for in-state transportation.

This is precisely the type of "economic protectionism" that the Commerce Clause prohibits. Indeed, the Court has called such discrimination

"virtually per se invalid," *Oregon Waste Sys.*, 511 U.S. at 99.

In short, the Ohio taxation scheme systematically disadvantages interstate pipeline companies in competing with LDCs. The Ohio Supreme Court's refusal to recognize a Commerce Clause violation on the facts below cannot be squared with the Court's Commerce Clause precedent.

II. THE DECISION HERE CONFLICTS WITH *IN RE CIG FIELD SERVICES COMPANY*, 279 KAN. 857 (2005).

Not only does the decision here directly conflict with *Tracy* and the Commerce Clause principles it elaborates, it also conflicts with *In re CIG Field Services Co.*, 279 Kan. 857 (2005), in which the Kansas Supreme Court applied *Tracy* in the natural gas pipeline context. This conflict provides a second basis warranting review.

In *In re CIG*, the Kansas Supreme Court struck down on Commerce Clause grounds a state tax statute that assessed property owned by interstate and intercounty gas gathering systems at one rate (33% of fair market value), and property owned by intracounty gas gatherers at a more favorable rate (25% of fair market value). 279 Kan. at 859. The court recognized that under *Tracy* the first question was whether the two differently treated groups were "similarly situated." Id. at 867. In answering that question, though, the court did not limit its inquiry, as the Ohio Supreme Court did here, to whether the two groups competed in the residential market. Nor did the court suggest that it was necessary to show that the two groups competed in every market in which each operated. Rather, the question was

merely whether the two groups engaged in "actual or prospective competition," see id. (quoting *Tracy*), in such a way that "the statute's discrimination affects the systems' economic choices in competitive markets," see id. at 868. Because the different types of entities competed in at least some of the markets they served, the court concluded that they were "similarly situated" for Commerce Clause purposes. Id. at 869.

Applying the Kansas Supreme Court's approach here, of course, would have resulted in a finding that the interstate pipeline companies and LDCs are "similarly situated." The record evidence clearly shows, and the Ohio Supreme Court did not dispute, that interstate pipeline companies and LDCs directly compete in many of their activities, and that the differential taxation would thus necessarily "affect[ ] the systems' economic choices in competitive markets." 279 Kan. at. 868. It was only as a result of the Ohio court's single-minded focus on the residential market, a focus decidedly absent in *In re CIG*, that the court concluded the groups were not "similarly situated." Only this Court can resolve which of these two inconsistent understandings of "similarly situated" under the Commerce Clause is correct, and Columbia Transmission urges the Court to use this case as a vehicle to do so.

III. THE DECISION BELOW CONTRAVENES CONGRESS'S GOAL OF MAINTAINING A UNIFORM NATIONWIDE NATURAL GAS MARKET AND THREATENS TO UNDERMINE THE DEVELOPMENT OF NECESSARY NATURAL GAS INFRASTRUCTURE.

Not only does the decision below create a clear conflict with this Court's decisions, as well as the decision of another state supreme court, but it does so in an area of exceptional national importance. No one can doubt that energy infrastructure issues have taken on increased significance in recent years and particularly now, and on that front, the Ohio court's decision threatens to undermine Congress's stated policy goal of achieving a uniform nationwide natural gas market.

Natural gas is a vital component of our country's energy resources, an importance that only continues to grow as the cost of oil rises. In assessing how best to meet the country's natural gas needs, both Congress and the FERC have often stated their belief that America's natural gas markets are best served by a uniform nationwide marketplace in which competitors across the country compete on an even playing field.

One driver behind the Natural Gas Policy Act of 1978, for example, was Congress's desire to create a competitive nationwide marketplace. See *Tracy,* 519 U.S. at 816. See also S. Rep. No. 436, 95th Cong., 1st Session 21 (1977) (noting the need to eliminate "the interstate-intrastate distinction ... together with the resulting distorting effect on both production and distribution"). Similarly, in issuing Order No. 636, which mandated that interstate pipelines unbundle

transportation and the sale of gas, (essentially forcing pipeline companies to serve as common carriers) FERC expressly noted its goal of creating a "competitive, national market":

> "This rule will therefore reflect and finally complete the evolution to competition in the natural gas industry initiated by those changes so that all natural gas suppliers, including the pipeline as merchant, will compete for gas purchasers on an equal footing."
>
> * * *
>
> "The first goal is to ensure that all shippers have meaningful access to the pipeline transportation grid so that willing buyers and sellers can meet in a competitive, national market to transact the most efficient deals possible."

Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 636, 57 Fed. Reg. 13,267 (1992), F.E.R.C. Stats. and Regs., Regulations Preambles January 1991-June 1996 ¶ 30,939 at 30,391, 30,393 (April 8, 1992) (subsequent history omitted).

And six months later, when it amended Order 636, FERC again noted the need to "ensure there is no obstacle to the consumers' access to a natural gas pipeline grid and to the blossoming national gas market." Order No. 636-A., 57 Fed. Reg. 36,128 (1992), F.E.R.C. Stats. and Regs., Regulations Preambles January 1991 - June 1996 ¶ 30,950 at 30,538 (August 3, 1992) (subsequent history omitted). More recently, the FERC has noted its interest in

"standardiz[ing] the business practices and communication methodologies of interstate pipelines in order to create a more integrated and efficient pipeline grid." *Standards for Business Practices of Interstate Natural Gas Pipelines,* Order No. 587-S, 70 Fed. Reg. 28,204 (2005), 70 Fed. Reg. 37,031 (2005), F.E.R.C. Stats and Regs., Regulations Preambles ¶ 31,179 at 31,396 (June 28, 2005). And only six months ago, the Commission again stated its desire to ensure a "competitive, national market." *Promotion of a More Efficient Capacity Release Market,* 72 Fed. Reg. 65,916 (2007), F.E.R.C. Stats. and Regs., Proposed Regulations Preambles ¶ 32,625 at 33,410 (November 15, 2007).

Developing and maintaining this "competitive, national market" will require a new and improved natural gas infrastructure, a fact that both Congress and the FERC have explicitly recognized. In the Energy Policy Act of 2005 (EPAct 2005), Pub. L. No. 109-58, 119 Stat. 594 (2005), Congress enacted several provisions designed to encourage both the construction of new energy facilities and the improvement of existing ones. Section 1241 of EPAct 2005, for example, directed FERC to establish incentive-based rate treatments that promote investment in electric transmission facilities. Section 311 gave FERC exclusive authority to approve applications for the siting, construction, expansion, or operation of liquefied natural gas (LNG) terminals. Section 1263 repealed the Public Utility Holding Company Act of 1935, which was thought to be a disincentive to investment in energy infrastructure. And Section 312 authorized FERC to allow interstate pipeline companies, such as Petitioner, to charge market-based (as opposed to cost-based) rates for new

natural gas storage capacity—even if the company cannot demonstrate that it lacks market power—where, among other things, those rates are necessary to encourage the construction of storage capacity in areas needing additional storage services.

In enacting Section 312 of EPAct 2005, Congress specifically recognized the important role that underground natural gas storage facilities, such as those owned and operated by Petitioner and other interstate pipeline companies (and LDCs), play in meeting the nation's energy needs. That role is twofold. First, as FERC explained in its order implementing the provisions of Section 312, storage is "critical in assuring that overall demands and specific requirements of natural gas customers are met." *Rate Regulation of Certain Natural Gas Storage Facilities,* Order No. 678, 71 Fed. Reg. 36,612 (2006), F.E.R.C. Stats. and Regs., Regulations Preambles ¶ 31,220 at 30,408 (June 19, 2006). Since gas usage increases significantly during the colder winter months, withdrawals from storage are needed to meet ongoing demand that cannot be satisfied with flowing gas supplies from current production. One estimate cited by FERC indicated that the combined energy needs of the United States and Canada will require an additional 700 billion cubic feet of storage capacity by 2025. Id. at 30,409.

Second, as FERC went on to explain, "[s]torage can have a moderating influence on gas prices." Id. This occurs because gas storage functions as a physical hedge. Customers can build up inventories during periods of lower demand, and later rely on those supplies instead of paying high spot market prices. Id. In fact, a FERC report concluded that storage

"may be the best way of managing gas commodity price[s] . . ." Id.

As a result of these considerations, FERC made various changes to its regulations "in order to facilitate the development of new natural gas storage capacity to ensure that adequate storage capacity will be available to meet anticipated market demand and to mitigate natural gas price volatility." Id.

In offering natural gas storage services, however, Petitioner and other interstate pipeline companies operating in Ohio must compete directly with local gas distribution companies, such as Dominion East Ohio. Supp. at 8. Although these companies operate storage facilities that are functionally equivalent to those operated by interstate pipeline companies, they are nonetheless classified as "natural gas companies" under the Ohio statutes, and their property is therefore taxed at 25% of true value, rather than the 88% rate which applies to interstate pipeline company property.

The Ohio Supreme Court's decision allowing unfettered discrimination against Petitioner and other companies doing business in interstate commerce runs directly counter to the incentives provided by Congress and FERC, and significantly inhibits the ability of these companies to construct and operate new natural gas pipelines, storage capacity, and other facilities needed to meet the nation's growing energy needs. Indeed, as noted above, Ohio's tax essentially acts as a tariff—gas produced in Ohio that remains in Ohio can be shipped through LDC-owned pipelines, and thus bear a lower effective tax rate than Ohio gas shipped into interstate commerce or out-of-state gas shipped into

Ohio. And with regard to competitive services such as gas storage, the discriminatory impact will be even more directly felt, as the Ohio LDCs will be able to pass along the discriminatory tax savings to their customers, thereby directly undercutting the interstate pipeline companies' competitive efforts.

If other states adopt similar taxes, the balkanizing effect of such discrimination will only increase. The "integrated and efficient pipeline grid" that Congress had envisioned as creating a uniform nationwide market could well be replaced by a patchwork quilt of intrastate pipelines, thereby frustrating the movement of natural gas across state lines.

And the threat of these discriminatory taxes spreading beyond Ohio is not merely theoretical. Already both Kansas and Louisiana have sought to impose taxes that treat interstate companies more harshly than local competitors. See *In re CIG Field Services Co.,* 279 Kan. 857 (2005); *ANR Pipeline Co. v. Louisiana Tax Commission,* 923 So. 2d 81 (La. App. 2005) (discussing Louisiana Tax Commission's efforts to use a different methodology to assess intrastate pipeline companies than interstate pipeline companies). Nor are the states' efforts in that regard surprising. Interstate pipeline companies typically operate (as there name suggests) in many states and thus often lack significant political capital in any one particular state, especially as compared to their more local competitors. Similarly, a heightened tax on interstate pipelines is politically attractive, as the costs of such a tax are to some extent born by the interstate pipeline company's consumers, who are often not even residents of the taxing state. In light of such pressures, decisions like the one below will only

embolden legislators to enact even more such discriminatory taxes.

In sum, the Ohio Supreme Court's decision creates substantial impediments for the development of an "integrated and efficient pipeline grid" and thus interferes with Congress's goal of developing a "competitive, national market." Given these significant and perhaps irrevocable consequences on this issue of national importance, as well as the conflicts the decision below creates, Columbia Transmission respectfully urges the Court to grant certiorari and reverse the Ohio Supreme Court's decision.

CONCLUSION

For the above-stated reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

CARRIE J. HIGHTMAN
STEPHEN R. MELTON
KENNETH W. CHRISTMAN
NiSource Corporate Services Co.
801 E. 86th Avenue
Merrillville, IN 46410
(219) 647-6047

DOUGLAS R. COLE*
** Counsel of Record*
MARYANN B. GALL
PHYLLIS SHAMBAUGH
JONES DAY
P.O. Box 165017
Columbus, OH 43216-5017
Telephone: (614) 469-3939
Facsimile: (614) 461-4198

Counsel for Petitioner

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[Cite as Columbia Gas Transm. Corp. v. Levin, 117 Ohio St.3d 122, 2008-Ohio-511.]

COLUMBIA GAS TRANSMISSION CORPORATION, APPELLEE AND CROSSAPPELLANT, v. LEVIN, TAX COMMR., APPELLANT AND CROSS-APPELLEE.

[Cite as Columbia Gas Transm. Corp. v. Levin, 117 Ohio St.3d 122, 2008-Ohio-511.]

Personal-property tax — Company primarily engaged in interstate transportation of natural gas is a pipeline company, not a natural gas company, for purpose of taxing company's personal property.

(No. 2006-1443 – Submitted May 2, 2007 – Decided February 14, 2008.)

APPEAL and CROSS-APPEAL from the Board of Tax Appeals, No. 2003-K-1876.

CUPP, J.

{¶ 1} In this matter, the Tax Commissioner appeals from a decision of the Board of Tax Appeals ("BTA") that reversed the Tax Commissioner's determination that Columbia Gas Transmission Corporation ("Columbia") is an interstate-pipeline company as defined in R.C. 5727.01(D)(5) for the purpose of taxing the personal property of an Ohio public utility. The BTA held instead that Columbia satisfied the definition of a natural gas company in R.C. 5727.01(D)(4) and was thus entitled to have its personal property assessed at the 25 percent

valuation rate for such companies in R.C. 5727.111(C), rather than the 88 percent rate for pipeline companies in R.C. 5727.111(D). After review, we have determined that the BTA's decision was unreasonable and unlawful, and therefore, in accordance with R.C. 5717.04, it is reversed. We further find that Columbia's cross-appeal is without merit, and it is overruled.

{¶ 2} In 2000, the General Assembly amended R.C. 5727.111 to reduce the assessment rate on the value of public-utility personal property of Ohio natural gas companies from 88 percent to 25 percent. The 25 percent rate became SUPREME COURT OF OHIO effective beginning with the 2001 tax year. See Am.Sub.S.B. No. 287, 148 Ohio Laws, Part V, 11536, 11549-11550.

{¶ 3} Columbia operates a natural gas pipeline that runs through a number of states. Columbia also maintains an underground system for storing natural gas. For the 2000 and 2001 tax years,[1] the Tax Commissioner assessed Columbia's personal property at the 88 percent rate for natural-gas-pipeline companies.

{¶ 4} Columbia objected to having its taxable property assessed at the 88 percent rate. Columbia claimed that it is a natural gas company under R.C. 5727.01(D)(4), and it requested that the Tax Commissioner reassess its personal property at the 25 percent rate for natural gas companies in R.C. 5727.111(C).

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[1] Columbia's statutory challenges pertain only to the 2001 tax year, while its constitutional challenges pertain to the 2000 and 2001 tax years.

{¶ 5} The Tax Commissioner found that Columbia was not a natural gas company under R.C. 5727.01(D)(4) because it does not supply or distribute natural gas directly to end-use consumers; rather, Columbia transports natural gas interstate through a network of pipelines. Specifically, the Tax Commissioner stated that Columbia's "transportation and storage services are for local gas distribution companies and industrial and commercial customers that contract for gas with producers or marketers. Therefore, [Columbia] is properly classified as a pipeline company under R.C. 5727.01(D)(5)."

{¶ 6} The Tax Commissioner also found that Columbia does not fit the profile of a typical natural gas company. Such companies usually operate in one state only, while pipeline companies tend to be interstate businesses. The Tax Commissioner further noted that the Public Utilities Commission of Ohio ("PUCO") regulates natural gas companies that operate in Ohio, and PUCO does not consider Columbia a natural gas company. Instead, the Federal Energy Regulatory Commission ("FERC") regulates interstate-pipeline companies, and Columbia is subject to regulation by FERC, not PUCO.

{¶ 7} Columbia appealed the Tax Commissioner's final determination to the BTA. The BTA reversed the Tax Commissioner, finding that Columbia satisfied the definition of a natural gas company in R.C. 5727.01(D)(4). The BTA found that R.C. 5727.01(D)(4) was unambiguous and that Columbia satisfied the statutory definition by directly supplying "natural gas to industrial, power-generating, residential, and farm customers for the

purposes (i.e., lighting, power, or heating) delineated in R.C. 5727.01(D)(4)." The BTA also determined that, while Columbia may satisfy the definition of a pipeline company in R.C. 5727.01(D)(5), neither R.C. 5727.01(D)(4) nor (5) imposes a "primary business" test as an element in determining under which definition an entity should be classified for tax purposes. Accordingly, the BTA held that Columbia was entitled to have its property assessed at 25 percent.

{¶ 8} Columbia also argued that applying the pipeline assessment rate to its property violates the Equal Protection and Due Process Clauses of the United States and Ohio Constitutions and the Commerce and the Supremacy Clauses of the United States Constitution. The BTA recognized that it lacked jurisdiction to decide the merits of Columbia's constitutional challenges. See Cleveland Gear Co. v. Limbach (1988), 35 Ohio St.3d 229, 231, 520 N.E.2d 188.

{¶ 9} The Tax Commissioner appealed from the BTA's decision. Columbia filed a protective cross-appeal, again raising its constitutional arguments.

Standard of Review

{¶ 10} In reviewing a decision of the BTA, we determine whether it is "reasonable and lawful." Columbus City School Dist. Bd. of Edn. v. Zaino (2001), 90 Ohio St.3d 496, 497, 739 N.E.2d 783. We "will not hesitate to reverse a BTA decision that is based on an incorrect legal conclusion." Gahanna-Jefferson Local School Dist. Bd. of Edn. v. Zaino (2001), 93 Ohio St.3d 231, 232, 754 N.E.2d 789. However, we will affirm the BTA's determinations of factual issues if the record contains reliable and

probative evidence to support the BTA's findings. Am. Natl. Can Co. v. Tracy (1995), 72 Ohio St.3d 150, 152, 648 N.E.2d 483.

{¶ 11} The burden rests on the taxpayer "to show the manner and extent of the error in the Tax Commissioner's final determination." Stds. Testing Laboratories, Inc. v. Zaino, 100 Ohio St.3d 240, 2003-Ohio-5804, 797 N.E.2d 1278, ¶ 30. The Tax Commissioner's findings "are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful." Nusseibeh v. Zaino, 98 Ohio St.3d 292, 2003-Ohio-855, 784 N.E.2d 93, ¶ 10.

The Tax Commissioner's Appeal

Is a Primary-Business Test Applicable to R.C. 5727.01?

{¶ 12} The Tax Commissioner contends that for determining the proper assessment rate to apply to public-utility property under R.C. 5727.111, an interstate-pipeline company that primarily transports natural gas through pipelines from production and wholesale sources to natural gas distribution systems is a "pipe-line company" as defined by R.C. 5727.01(D)(5), and not a "natural gas company" as defined by R.C. 5727.01(D)(4).

{¶ 13} For purposes of taxing a public utility, a person includes "a natural gas company when engaged in the business of supplying natural gas for

lighting, power, or heating purposes to consumers within this state." See former R.C. 5727.01(D)(4).[2] According to R.C. 5727.01(D)(5), a person also includes "a pipe-line company when engaged in the business of transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partially within this state."

{¶ 14} The Tax Commissioner maintains that the BTA overlooked the dispositive statute on this issue: R.C. 5727.02. The Tax Commissioner argues that R.C. 5727.02(A) expressly establishes a primary-business test for purposes of defining "natural gas company" under R.C. 5727.01(D)(4). In contrast, Columbia argues that R.C. 5727.02 does not address how to distinguish between types of public utilities (e.g., between pipeline and natural gas companies). Rather, it establishes a test for determining whether an entity is a "public utility" at all.[3]

{¶ 15} The BTA found that "[n]either R.C. 5727.01(D)(4) nor (5) imposes a 'primary business' test as an element in determining under which

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[2] R.C. 5727.01(D)(4) was amended during the 2001 tax year to add the words "or distributing" after the word "supplying." The amendment also excluded from the definition of natural gas company "a person that is a governmental aggregator or retail natural gas supplier as defined in" R.C. 4929.01. All references to R.C. 5727.01(D)(4) are to the former version, which was controlling during the time period involved in this matter. Sub.H.B. No. 9, 149 Ohio Laws, Part II, 3857, 3895-3896.

[3] Columbia incorrectly claims that this issue was not preserved for appeal; the Tax Commissioner raised this issue in his amended notice of appeal. See R.C. 5717.04.

definition an entity should be classified for tax purposes." The BTA mentioned R.C. 5727.02 in passing, indicating that the statute differentiated "between 'primary' and 'incidental' business activities of various public utilities referenced within R.C. Chapter 5727." Yet the BTA did not analyze or apply R.C. 5727.02 to this matter. We find that the BTA erred in failing to construe R.C. 5727.01 in pari materia with R.C. 5727.02.

{¶ 16} For the 2001 tax year, R.C. 5727.02 provided:

{¶ 17} "As used in this chapter, 'public utility,' 'electric company,' 'natural gas company,' 'pipe-line transportation company' or 'heating company' does not include any of the following:

{¶ 18} "(A) Any person that is engaged in some other primary business to which the supplying of electricity, heat, natural gas, water, water transportation, steam, or air to others is incidental." See Am.Sub.S.B. No. 3, 148 Ohio Laws, Part IV, 7962, 8080.

{¶ 19} The first rule of statutory construction is to look at the statute's language to determine its meaning. If the statute conveys a clear, unequivocal, and definite meaning, interpretation comes to an end, and the statute must be applied according to its terms. Lancaster Colony Corp. v. Limbach (1988), 37 Ohio St.3d 198, 199, 524 N.E.2d 1389. Courts may not delete words used or insert words not used. Cline v. Ohio Bur. of Motor Vehicles (1991), 61 Ohio St.3d 93, 97, 573 N.E.2d 77.

{¶ 20} We hold that R.C. 5727.02 establishes a primary-business test for determining whether an entity is a public utility for tax purposes and also for

distinguishing between types of public utilities. "Public utility" is one of the entities to which the statute applies. But the statute also applies to an electric company, natural gas company, pipeline company, water-works company, water-transportation company, or heating company. R.C. 5727.02 separates these classifications by use of the word "or," which is defined "as a function word indicating an alternative between different or unlike things." Pizza v. Sunset Fireworks Co., Inc. (1986), 25 Ohio St.3d 1, 4-5, 25 OBR 1, 494 N.E.2d 1115. See also R.C. 1.42 ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage"). The General Assembly's use of the disjunctive "or," as opposed to the conjunctive "and," indicates that the classifications are intended to be read separately from each other, and public utility is only one of the classifications to which R.C. 5727.02 applies.

{¶ 21} Construed in pari materia with R.C. 5727.01, R.C. 5727.02(A) applies to those public utilities defined in R.C. 5727.01 as engaged in the business of supplying a particular commodity (e.g., electricity, heat, natural gas). Accordingly, R.C. 5727.02(A) would except a company from one or more of the public-utility classifications in its first paragraph if that company is engaged in some other primary business to which supplying a particular commodity is incidental. Indeed, the BTA has previously construed R.C. 5727.02 in the same manner. See Cent. Trust Co. v. Lindley (July 25, 1979), B.T.A. No. 78-C-244 (reading R.C. 5727.01 and 5727.02 in pari materia to find that company was not a "heating company" because it primarily engaged in another business and only incidentally supplied

steam to others); Chrysler Corp. v. Tracy (Jan. 21, 1994), B.T.A. No. 91-K-1523, 1994 WL 19032, at *11, affirmed on other grounds (1995), 73 Ohio St.3d 26, 652 N.E.2d 185 (adopting the reasoning of Cent. Trust to find that company was not a natural gas company because it was primarily engaged in marketing natural gas rather than supplying natural gas to consumers).

{¶ 22} Columbia counters that if it falls outside the definition of "natural gas company" because it engages in some other primary business to which supplying natural gas is incidental, then it also cannot qualify as a pipeline company, and therefore it is not a public utility. Columbia's argument is without merit for the following reasons.

{¶ 23} First, the General Assembly chose to distinguish between natural gas companies and pipeline companies by defining them differently in R.C. 5727.01(D)(4) and (5). Columbia could be classified as a pipeline company – and hence a public utility – and yet not be a natural gas company, because supplying natural gas is only incidental to its primary business of transporting natural gas.

{¶ 24} Second, pipeline companies are not included in the list of companies that are excepted by R.C. 5727.02(A). The first paragraph of R.C. 5727.02 lists those entities that can be excepted from the definitions set forth in R.C. 5727.01. R.C. 5727.02(A), however, applies only to those entities supplying electricity, heat, natural gas, water, water transportation, steam, or air to others. A pipeline company is any person "transporting natural gas, oil, or coal or its derivatives through pipes or tubing, either wholly or partially within this state."

(Emphasis added.) R.C. 5727.01(D)(5). Because pipeline companies are those defined as "transporting" rather than "supplying" a commodity, division (A) of R.C. 5727.02 cannot act to except pipeline companies. In short, contrary to Columbia's argument, applying R.C. 5727.02(A) to this matter would not have the effect of disqualifying it as a natural gas company, as a pipeline company, and as a public utility.

{¶ 25} Accordingly, as applied to this matter, R.C. 5727.02(A)(1) provides that a natural gas company does not include "any person that is engaged in some other primary business to which the supplying of * * * natural gas * * * to others is incidental." Thus, although Columbia may fall within the definition of "natural gas company" in R.C. 5727.01(D)(4) by supplying natural gas for lighting, power, or heating purposes to consumers within this state, according to R.C. 5727.02(A), it may not be considered a natural gas company for the purpose of taxing a public utility if it is engaged in some other primary business to which supplying natural gas to others is incidental.

{¶ 26} Columbia's Primary Business. The evidence in this case shows that Columbia is primarily engaged in the business of transporting natural gas interstate through a network of pipelines in ten states. Columbia offers "a variety of services related to the movement of natural gas, specifically transportation," as well as services involving the underground storage of natural gas.

{¶ 27} Testimony before the BTA indicated that Columbia's primary customers are natural gas companies and natural gas marketers. Natural gas companies, generally termed local distribution

companies ("LDCs"), are companies that distribute natural gas by receiving gas from a pipeline company's transmission system and delivering the gas to the end user.[4] Marketers use Columbia's pipeline capacity to provide bundled natural gas services for their customers.

{¶ 28} Columbia does not own any of the natural gas that it transports, nor does it own any distribution or supplying property. Further evidence revealed that Columbia's pipelines are not configured to provide a substantial delivery service to residential customers.

{¶ 29} Columbia does have "direct-connect customers," i.e., customers that receive gas directly from a Columbia transmission pipeline rather than from an LDC. Columbia's direct-connect customers include power companies, industrial customers, and farm-tap customers. In fact, Columbia has almost 32,000 farm-tap customers.

{¶ 30} However, according to Carl Levander, a vice president for Columbia's parent corporation, NiSource, these customers represent a "finite universe" of end-use customers who are located in close proximity to Columbia's pipelines. Moreover, the volume of gas transported to these direct-connect customers is a "relatively small percentage" and the revenue generated from these customers is "minimal compared to the total revenues" generated from

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[4] LDCs located in Ohio satisfy the definition of "natural gas company." R.C. 4905.03(A)(6); see generally Gen. Motors Corp. v. Tracy (1997), 519 U.S. 278, 282, 117 S.Ct. 811, 136 L.Ed.2d 761.

Columbia's transmission business. Indeed, according to Columbia's Ohio Public Utility Gross Receipts Tax Reports for tax years 2000 and 2001, Columbia did not report any revenue from natural gas distribution; all receipts were from natural gas transmission.

{¶ 31} In sum, the vast majority of Columbia's pipeline business is the interstate transportation of natural gas. Any natural gas supplied to its direct-connect customers is incidental to Columbia's primary business as a pipeline company. Thus, pursuant to R.C. 5727.02(A), Columbia does not fall within the definition of a natural gas company in R.C. 5727.01(D)(4).

Columbia's Contrary Arguments

{¶ 32} Columbia contends that an Ohio taxpayer that transports natural gas interstate by pipeline and delivers natural gas, directly and indirectly, to Ohio consumers satisfies the definition of a "natural gas company" in R.C. 5727.01(D)(4) and is entitled to be taxed as a natural gas company under R.C. 5727.111(C). Columbia maintains that delivering natural gas to even a small number of consumers, and especially to large-volume consumers such as its power and industrial customers, is adequate to put Columbia in the business of supplying and distributing natural gas.

{¶ 33} Columbia's primary argument to support this claim is that statutes imposing a tax are to be construed strictly against the state and liberally in favor of the taxpayer. According to Columbia, because it satisfies the definition of both a natural gas company under R.C. 5727.01(D)(4), and a pipe-line company under R.C. 5727.01(D)(5), the statutes must

be construed to give Columbia the benefit of the more favorable category.

{¶ 34} Columbia is correct that a statute that imposes a tax requires strict construction against the state, with any doubt resolved in favor of the taxpayer. See Gulf Oil Corp. v. Kosydar (1975), 44 Ohio St.2d 208, 73 O.O.2d 507, 339 N.E.2d 820, paragraph one of the syllabus; Lancaster Colony Corp., 37 Ohio St.3d at 199, 524 N.E.2d 1389; Lakefront Lines, Inc. v. Tracy (1996), 75 Ohio St.3d 627, 629, 665 N.E.2d 662. But rules of strict construction do not apply if the statutory language is plain and unambiguous, because such statutes are to be applied as written, not construed in any party's favor. See Storer Communications v. Limbach (1988), 37 Ohio St.3d 193, 194, 525 N.E.2d 466; Lancaster Colony Corp., 37 Ohio St.3d at 199, 524 N.E.2d 1389. R.C. 5727.02(A) clearly excepts Columbia from the definition of natural gas company in R.C. 5727.01(D)(4) because Columbia's primary business is interstate natural gas transportation and not local distribution.

{¶ 35} Moreover, we have rejected the strict-construction doctrine when its application would result in unreasonable or absurd consequences. See CC Leasing Corp. v. Limbach (1986), 23 Ohio St.3d 204, 207, 23 OBR 364, 492 N.E.2d 421. Indeed, it is the function of courts to construe statutory language to effect a just and reasonable result. Gulf Oil Corp., 44 Ohio St.2d 208, 73 O.O.2d 507, 339 N.E.2d 820, paragraph two of the syllabus. See also R.C. 1.47(C) (in enacting a statute, it is presumed that a just and reasonable result is intended).

{¶ 36} It would be unreasonable to tax Columbia's entire property under the lower natural-gas-company rate when Columbia's pipeline and equipment are primarily used in transporting natural gas and not in supplying gas to end-user consumers. Columbia would have us tax its personal property based on a minor incidental use, rather than its major and primary use. But Columbia's interpretation of R.C. 5727.01(D)(4) and (5) would blur the distinction between natural gas companies and pipeline companies. Indeed, were we to accept Columbia's position, an interstate-pipeline company supplying natural gas to even one end-use consumer could be classified as an Ohio natural gas company for the purpose of taxing the personal property of a public utility.

{¶ 37} Columbia additionally claims that by delivering natural gas to LDCs for subsequent delivery to the end-use customers of the LDCs, Columbia is supplying natural gas to Ohio consumers. Yet one is a natural gas company only when "supplying natural gas for lighting, power, or heating purposes to consumers within this state." R.C. 5727.01(D)(4). When Columbia transports natural gas to LDCs, who then deliver the gas to end-use consumers, it is not "supplying" natural gas to the LDCs for the purposes contemplated by R.C. 5727.01(D)(4). See Chrysler Corp. v. Tracy, 73 Ohio St.3d 26, 652 N.E.2d 185. Under Columbia's interpretation, all pipeline companies would automatically qualify as Ohio natural gas companies simply by transporting gas to an LDC's distribution facility. That cannot be the construction intended by the General Assembly.

Conclusion

{¶ 38} Based on the foregoing, we find that the BTA erred in failing to construe R.C. 5727.01 in pari materia with R.C. 5727.02. R.C. 5727.02(A) establishes a primary-business test for purposes of defining a natural gas company pursuant to R.C. 5727.01(D)(4). Because Columbia is primarily engaged in the business of a pipeline company, it is not a natural gas company for purposes of Ohio's personal property tax on public utilities. Accordingly, we reverse the decision of the BTA. Columbia Gas Transmission's Cross-Appeal

{¶ 39} Columbia has filed a protective cross-appeal contending that the assessment of its personal property at the 88 percent rate for pipeline companies is impermissible as a matter of constitutional law. We reject each of Columbia's constitutional challenges.

Due Process

{¶ 40} In proposition of law No. 2, Columbia maintains that under the Tax Commissioner's interpretation, R.C. 5727.01(D)(4) and (5) fail to adequately define tax classifications subject to different assessment rates and are void for vagueness on their face and as applied, in violation of due process protections in the Ohio and United States Constitutions.

{¶ 41} A court's power to invalidate a statute "is a power to be exercised only with great caution and in the clearest of cases." Laws are entitled to a "strong presumption of constitutionality," and the party challenging the constitutionality of a law "bears the burden of proving that the law is unconstitutional beyond a reasonable doubt." Yajnik v. Akron Dept. of

Health, Hous. Div., 101 Ohio St.3d 106, 2004-Ohio-357, 802 N.E.2d 632, ¶ 16; Buckley v. Wilkins, 105 Ohio St.3d 350, 2005-Ohio-2166, 826 N.E.2d 811, ¶ 18.

{¶ 42} "When a statute is challenged under the due-process doctrine prohibiting vagueness, the court must determine whether the enactment (1) provides sufficient notice of its proscriptions to facilitate compliance by persons of ordinary intelligence and (2) is specific enough to prevent official arbitrariness or discrimination in its enforcement." Norwood v. Horney, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 84, citing Kolender v. Lawson (1983), 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903. Moreover, laws directed to economic matters are subject to a less strict vagueness test than laws interfering with the exercise of constitutionally protected rights. Hoffman Estates v. Flipside, Hoffman Estates, Inc. (1982), 455 U.S. 489, 498-499, 102 S.Ct. 1186, 71 L.Ed.2d 362.

{¶ 43} **Facial Challenge.** A court examining a facial-vagueness challenge to a statute that implicates no constitutionally protected conduct will uphold that challenge only if the statute is impermissibly vague in all of its applications. Hoffman Estates, 455 U.S. at 494-495, 102 S.Ct. 1186, 71 L.Ed.2d 362. Yet Columbia makes no claim or showing that the statutes are invalid in all applications. Therefore, we reject Columbia's facial challenge.

{¶ 44} **As-Applied Challenge.** Columbia claims that when a company both transports natural gas and supplies it to consumers, the definitions of "natural gas company" and "pipeline company" provide no

objective basis for classifying that company as one or the other. Thus, according to Columbia, the Tax Commissioner lacks legislative guidance and must simply decide for himself under which classification the company falls. In Columbia's view, the Tax Commissioner's "subjective" decision is "wholly unconstrained" and opens the door to arbitrary and discriminatory application.

{¶ 45} Columbia makes a blanket assertion that "[u]nder any meaningful vagueness standard, the statute here fails. * * * It attempts to draw a tax-determinative distinction between those companies that 'supply' natural gas and those that 'transport' natural gas – a distinction that in today's natural gas market is 'substantially incomprehensible.' " Quoting Buckley v. Wilkins, 105 Ohio St.3d 350, 2005-Ohio-2166, 826 N.E.2d 811, ¶ 19.

{¶ 46} A civil statute that does not implicate the First Amendment is unconstitutionally vague only if it is so vague and indefinite that it sets forth no standard or rule or if it is substantially incomprehensible. Id.; Hoffman Estates, 455 U.S. at 495, 102 S.Ct. 1186, 71 L.Ed.2d 362, fn. 7. Moreover, the void-for-vagueness doctrine "does not require statutes to be drafted with scientific precision." Perez v. Cleveland (1997), 78 Ohio St.3d 376, 378, 678 N.E.2d 537.

{¶ 47} R.C. 5727.01(D)(4) and (5) set forth specific definitions that clearly distinguish between natural gas companies, which supply natural gas, and pipeline companies, which transport natural gas. These are well-understood industry terms that track the clear division between state and federal regulations of the natural gas industry. See Natural

Gas Act of 1938, Section 717(b), Title 15, U.S.Code (defining FERC's jurisdiction over the interstate transportation of natural gas and exempting local distribution of gas from the Act); R.C. Chapter 4905 (PUCO has regulatory oversight over utilities that locally supply natural gas to end-user consumers in Ohio). Furthermore, R.C. 5727.02 establishes a primary-business test for distinguishing between the types of public utilities listed in R.C. Chapter 5727. Thus, the statutes provide standards for determining whether a company is classified as one or the other, and there is no basis for finding that the statutes encourage arbitrary and discriminatory enforcement on the part of the Tax Commissioner.

{¶ 48} Moreover, the availability of administrative remedies and appellate review acts to check any threat of arbitrary and discriminatory enforcement. See Perez v. Cleveland, 78 Ohio St.3d at 379, 678 N.E.2d 537, citing United States ex rel. Fitzgerald v. Jordan (C.A.7, 1984), 747 F.2d 1120, 1130. See also Hoffman Estates, 455 U.S. at 498, 102 S.Ct. 1186, 71 L.Ed.2d 362 (a "regulated enterprise may have the ability to clarify the meaning of [a] regulation by its own inquiry, or by resort to an administrative process"). The Tax Commissioner's initial assessment was based on Columbia's own Annual Ohio Public Utility Property Tax Natural Gas Pipeline Company Reports. Columbia was able to object to the Tax Commissioner's initial assessments by filing a petition for reassessment. Columbia was then able to appeal the Tax Commissioner's final determination to the BTA. Finally, Columbia had an appeal as of right to this court. Thus, contrary to Columbia's assertion, the Tax Commissioner's determination was not "wholly unconstrained."

{¶ 49} In sum, Columbia has not shown that the statutes invite subjective or discriminatory enforcement. See Grayned v. Rockford (1972), 408 U.S. 104, 113, 92 S.Ct. 2294, 33 L.Ed.2d 222. Because Columbia has not met its burden of showing that the statutes here are unconstitutional beyond a reasonable doubt, we overrule its second proposition of law.

Federal Commerce Clause

{¶ 50} Columbia contends in proposition of law No. 3 that where a federally regulated interstate-pipeline company competes in serving the same transportation and storage functions as state-regulated LDCs, the Commerce Clause forbids assessing the interstate pipeline's property at a higher rate than that of the competing LDCs.

{¶ 51} The Commerce Clause grants Congress the power "[t]o regulate Commerce * * * among the several States." Clause 3, Section 8, Article I, United States Constitution. The United States Supreme Court has recognized a negative or "dormant" Commerce Clause power that "prohibits state taxation, or regulation, that discriminates against or unduly burdens interstate commerce and thereby 'imped[es] free private trade in the national marketplace,' " (Citations omitted.) Gen. Motors Corp. v. Tracy (1997), 519 U.S. 278, 287, 117 S.Ct. 811, 136 L.Ed.2d 761, quoting Reeves, Inc. v. Stake (1980), 447 U.S. 429, 437, 100 S.Ct. 2271, 65 L.Ed.2d 244.

{¶ 52} Under consideration in Gen. Motors Corp. v. Tracy, 73 Ohio St.3d at 30, 652 N.E.2d 188, was an Ohio statute that imposed a general sales tax on sales of natural gas in the state and a use tax on natural gas purchases out-of-state. Ohio's tax scheme

exempted natural gas sales by entities that met the definition of "natural gas company" under R.C. 5727.01(D)(4). It was undisputed that natural gas utilities, or LDCs, located in Ohio satisfied the definition of "natural gas company." General Motors, a buyer of natural gas from an out-of-state marketer, challenged the exemption of LDCs from the sales and use tax imposed on sellers of natural gas. We found that non-LDC gas sellers, such as producers and independent marketers, were not natural gas companies under R.C. 5727.01(D)(4); therefore, their sales were outside the exemption and subject to the tax. Id., citing Chrysler Corp. v. Tracy, 73 Ohio St.3d 26, 652 N.E.2d 185 (both cases were issued the same day).

{¶ 53} The United States Supreme Court held that there was no Commerce Clause violation in Gen. Motors Corp. because the supposedly favored and disfavored entities were not similarly situated. 519 U.S. at 310, 117 S.Ct. 811, 136 L.Ed.2d 761. Specifically, the court found that the out-of-state marketers did not serve the LDCs' core market of small, captive end users of natural gas, including residential customers who wanted or needed bundled natural gas services and the protections afforded by utility regulation, and small-volume buyers who would not benefit economically from purchasing gas on the open market. Id. at 301-302, 117 S.Ct. 811, 136 L.Ed.2d 761. In short, the court premised its holding that Ohio's tax scheme was not facially discriminatory on the view that LDCs and independent marketers were principally serving different markets.

{¶ 54} Gen. Motors Corp. recognized that before a finding of discrimination under the Commerce Clause could be made, different treatment must be accorded to substantially similar entities. The court found that, where the allegedly competing entities provide different products, the threshold question is whether the companies are similarly situated for constitutional purposes. "This is so for the simple reason that the difference in products may mean that the different entities serve different markets, and would continue to do so even if the supposedly discriminatory burden were removed. If in fact that should be the case, eliminating the tax or other regulatory differential would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." Id. at 299, 117 S.Ct. 811, 136 L.Ed.2d 761. Therefore, we must first decide whether interstate-pipeline companies and LDCs are similarly situated.

{¶ 55} Columbia maintains that there are no relevant differences between interstate pipelines and LDCs that justify assessing interstate-pipeline companies at an 88 percent valuation rate and LDCs at 25 percent. See R.C. 5727.111(C), (D). We disagree.

{¶ 56} As in Gen. Motors Corp., the statutory scheme favors certain entities that satisfy the definition of a natural gas company in R.C. 5727.01(D)(4). Moreover, as in Gen. Motors Corp., the allegedly favored and disfavored entities here principally serve different markets.

{¶ 57} The evidence in this case shows that interstate-pipeline companies do not compete with

Ohio LDCs to service the residential and small commercial end-use natural gas consumer. Interstate-pipeline companies, like Columbia, primarily transport natural gas interstate from production areas to LDCs. The primary customers of interstate pipelines are not residential or small-volume-end-use consumers, but LDCs and independent and LDC-affiliated natural gas marketers. Even after significant restructuring of the natural gas industry, the core market of Ohio LDCs remains retail sales and distribution of natural gas to residential and small commercial end-use consumers.

{¶ 58} "[I]n the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply. The dormant Commerce Clause protects markets and participants in markets, not taxpayers as such." Gen. Motors Corp., 519 U.S. at 300, 117 S.Ct. 811, 136 L.Ed.2d 761. Because interstate-pipeline companies, like Columbia, and Ohio LDCs do not compete in the same market, they are not "similarly situated" for Commerce Clause purposes. Thus, we reject this claim. Columbia's Contrary Commerce Clause Arguments

{¶ 59} Columbia contends that interstate pipelines and LDCs are "substantially similar" for Commerce Clause purposes. In Columbia's view, interstate pipelines and LDCs are part of the same natural gas distribution network, own the same sorts of property, and compete with one another in various ways.

{¶ 60} LDC Transmission Property. In Columbia's view, LDCs do more than merely engage in the local distribution of natural gas to end users; rather, Columbia maintains that the evidence shows that LDCs are also engaged in the "transmission" of natural gas in direct competition with interstate-pipeline companies.

{¶ 61} Columbia submitted evidence to the BTA in an attempt to show that Ohio LDCs own and operate significant amounts of transmission pipeline. Columbia relied heavily on reports filed with the United States Department of Transportation's Office of Pipeline Safety, which distinguishes between transmission and distribution based on the size and pressure strength of the pipeline.

{¶ 62} Columbia's evidence in this regard is not persuasive. For public-utility-tax purposes, the Tax Commissioner has adopted FERC definitions that distinguish between interstate transportation or transmission and local distribution of natural gas. See Natural Gas Act of 1938, Section 717(B), Title 15, U.S.Code. According to the FERC, pipeline diameter and pressure are not controlling for purposes of distinguishing between interstate transportation and local distribution. See Midwestern Gas Transm. Co. (May 12, 1999), FERC No. CP98-538-001, 1999 WL 298625, at *7. Rather, the FERC defines interstate transportation as beginning at the point where the interstate pipeline receives gas from the gathering or production area and ending at the point where the interstate pipeline delivers gas into the LDC's distribution facility (commonly known as the "city gate"). See Part 201(29)(B), Title 18, C.F.R. See also Midwestern Gas Transm. Co. (Dec. 16, 1998), FERC

No. CP98-538-000, 1998 WL 878038, at *4 (local distribution – as opposed to interstate transportation – connotes a network of small local lines used to transmit gas from a large interstate pipeline to individual consumers spread out in a local geographic area).

{¶ 63} Furthermore, both FERC and federal courts have found that the transportation of natural gas by an interstate pipeline directly to an end-user constitutes transportation in interstate commerce, not local distribution. See Oklahoma Natural Gas Co. v. Fed. Energy Regulatory Comm. (C.A.D.C.1990), 906 F.2d 708, 710; Pub. Utils. Comm. of California v. Fed. Energy Regulatory Comm. (C.A.D.C.1990), 900 F.2d 269, 277.

{¶ 64} Nevertheless, Columbia claims that the FERC-defined "'distribution area' is a subjective concept, and is often treated as simply referring to a point where natural gas is transferred from an upstream pipeline company to a downstream LDC" and that "[e]ven under this location-driven definition, several Ohio LDCs identify a significant portion of their property as 'transmission' rather than 'distribution.' " However, Columbia's argument ignores the testimony of its own witnesses that the term "transmission" is also largely subjective and can have different meanings for purposes of utility ratemaking, safety, and taxation. In fact, in several instances, Columbia witnesses referred to LDC-owned "transmission" pipelines that FERC would have classified as "distribution" pipelines.

{¶ 65} Moreover, Columbia's witnesses had no specific knowledge whether this "transmission" property was actually used by LDCs to provide

transportation or distribution services. Finally, other testimony indicated that, whether designated as transmission or distribution, LDC-owned pipelines were primarily used to distribute gas to end-use customers. In short, Columbia's evidence does not show that interstate-pipeline companies are competing with LDCs for the same transportation-service customers.

{¶ 66} Direct Competition Between Interstate Pipelines and LDCs. Columbia claims that interstate-pipeline companies compete directly with Ohio LDCs in (1) directly delivering gas to large industrial and electric power end users and farm-tap customers, (2) providing storage services, and (3) providing gathering or production services. However, as the Tax Commissioner points out, the existence of other areas of actual or potential competition does not alter Gen. Motors Corp.'s holding.

{¶ 67} In Gen. Motors Corp., the court considered whether current or potential competition between marketers and LDCs in the noncaptive (nonresidential) market requires treating marketers and LDCs alike for dormant Commerce Clause purposes. That is, the court decided whether to "accord controlling significance to the noncaptive market in which they compete, or to the noncompetitive, captive market in which the local utilities alone operate." Gen. Motors Corp., 519 U.S. at 303-304, 117 S.Ct. 811, 136 L.Ed.2d 761.

{¶ 68} The court found that "a number of reasons support a decision to give the greater weight to the captive market and the local utilities' singular role in serving it, and hence to treat marketers and LDCs as dissimilar for present purposes." Id. at 304, 117 S.Ct.

811, 136 L.Ed.2d 761. Significantly, the court recognized the importance of traditional regulated service to the captive market and an obligation to proceed cautiously so as not to jeopardize the LDCs' continuing capacity to serve that market. Id. The court further noted that states have an important stake in protecting the captive market and that state regulation of natural gas sales to local consumers serves important interests in health and safety, including requiring a dependable supply and ensuring that residential customers are not frozen out of their houses in cold months. Id. at 306, 117 S.Ct. 811, 136 L.Ed.2d 761.

{¶ 69} Those interests are no less relevant to this matter than they were in Gen. Motors Corp. Ohio continues its regulation of natural gas rates and services to the benefit of residential and other small-volume users. See R.C. 4905.22 (requiring just and reasonable rates and adequate service and facilities) and R.C. 4905.14(B) (requiring each natural gas company to submit annual forecasts of future gas supply and demand). Ohio requires LDCs to serve all customers and ensure access to natural gas without discrimination. See R.C. 4905.02, 4905.03(A)(6), 4905.06, and 4905.35. See also R.C. 4929.02(A)(1) and (9) and 4929.03. Ohio also protects residential customers by requiring LDCs to follow certain administrative procedures before terminating service, and additional protections are afforded to ensure that Ohio LDCs provide continued service to low-income, elderly, and handicapped residential customers. R.C. 4933.12 and 4933.122; Ohio Adm.Code 4901:1-18. And Ohio LDCs are currently default providers, or providers of last resort, for customers who return to LDCs for natural gas when an alternative supplier

fails to provide service. See R.C. 4929.20(C)(2); Ohio Adm.Code 4901:1-27-12(G), (H), and (J).

{¶ 70} Columbia maintains that since Gen. Motors Corp. was decided, LDCs have unbundled their product and now are able to sell transportation and storage services separately from natural gas, meaning that LDCs directly compete with interstate pipelines that provide the same services. However, Columbia ignores the evidence that LDCs are still primarily serving the same residential and small-business markets that they were serving at the time Gen. Motors Corp. was decided.

{¶ 71} To be sure, LDCs now offer both bundled and unbundled services and, as Columbia notes, they can sell natural gas, transportation service, and storage service separately. Nevertheless, the main competitors of LDCs in the residential and small-business markets are not interstate-pipeline companies. Rather, independent and LDC-affiliated marketers compete with LDCs for commodity sales in this market. Moreover, marketers largely rely on the LDCs' distribution network to deliver their natural gas to end-use customers. In other words, interstate-pipeline companies do not compete for residential and small-business customers for either natural gas sales or transportation services.

{¶ 72} Columbia also maintains that it competes with Ohio LDCs in the residential market in direct delivery of natural gas to farm-tap customers. However, the existence of these farm-tap customers does nothing to support Columbia's claim that it directly competes in the Oho residential market.

{¶ 73} Farm-tap customers were described as rural customers who had been granted the right to tap into

Columbia's interstate-transmission pipeline at the time of construction. These farm taps were often given in exchange for an easement through the customer's land at the time of construction. At best, these farm-tap customers represent a small, unique segment of the residential market. Columbia offered evidence showing that it served over 30,000 farm-tap customers. By way of comparison, Columbia's affiliated LDC, Columbia Gas of Ohio, distributes natural gas to approximately 1.3 million residential customers.

{¶ 74} Columbia's Other Claims. Columbia alternatively argues that Gen. Motors Corp. is distinguishable because (1) it involved a comparison between a regulated utility and a nonregulated marketer, and (2) different taxes (sales and property) were involved. Neither claim has merit.

{¶ 75} First, the outcome in Gen. Motors Corp. did not turn on a comparison between regulated and unregulated entities. Rather, the court determined that LDCs and independent marketers were not "similarly situated" for dormant Commerce Clause purposes because they did not compete in the LDCs' core residential market, and eliminating any tax differential between the LDCs and marketers would not alter the competitive nature of this market. Gen. Motors Corp., 519 U.S. at 297-303, 117 S.Ct. 811, 136 L.Ed.2d 761. Columbia has not shown in this case that it competes with LDCs in the residential market or that it would compete in this market should we rule in its favor.

{¶ 76} Moreover, the fact that Columbia is "heavily regulated" does not make it "similarly situated" to state-regulated LDCs for purposes of the Commerce

Clause. Columbia is a federally regulated interstate-pipeline company. Congress and the courts have long treated federal and state regulation of the natural gas industry separately by exempting local distribution of natural gas from federal regulation. Indeed, the Gen. Motors Corp. court reaffirmed the continuing importance of the states' interest in regulating the local natural gas market, noting that even amidst recent regulatory changes intended to increase competition in the natural gas industry, Congress has done nothing to limit the states' traditional local regulation. See Gen. Motors Corp., 519 U.S. at 288-297, 117 S.Ct. 811, 136 L.Ed.2d 761 (describing historical evolution of natural gas industry and Congress's recognition of states' vital role in regulating the local market).

{¶ 77} Second, Gen. Motors Corp. also did not turn on the nature of the tax involved. In fact, the court suggested that the nature of the challenged tax was largely irrelevant in light of Ohio's complicated public-utility-property-taxation scheme, which subjects public utilities and nonutilities alike to an array of different tax burdens. Gen. Motors Corp., 519 U.S. at 307-308, 117 S.Ct. 811, 136 L.Ed.2d 761, fn. 16.

{¶ 78} In conclusion, Columbia's failure to show that it is in direct competition with Ohio LDCs in the residential market proves fatal to its dormant Commerce Clause claim. Therefore, Columbia's third proposition of law is overruled.

Federal Supremacy Clause

{¶ 79} Columbia argues in proposition of law No. 4 that assessing the personal property of interstate-pipeline companies at a higher rate than that of

LDCs and general businesses with which interstate-pipeline companies compete impairs and is inconsistent with federal regulatory authority and violates the Supremacy Clause of the United States Constitution.

{¶ 80} The Supremacy Clause of Article IV of the United States Constitution is the source of Congress's power to preempt state law. "Preemption may be express or implied, but in either case, the question is one of congressional intent." Michigan Consol. Gas Co. v. Panhandle E. Pipe Line Co. (C.A.6, 989), 887 F.2d 1295, 1300, citing California Fed. S. & L. Assn. v. Guerra (1987), 479 U.S. 272, 281, 107 S.Ct. 683, 93 L.Ed.2d 613. In the absence of express statutory language, Congress may implicitly intend to occupy a given field to the exclusion of state law. Such intent may be properly inferred if (1) the pervasiveness of the federal regulation precludes supplementation by the states, (2) the federal interest in the field is sufficiently dominant, or (3) the object of the federal law and the obligations imposed by it reveal the same purpose. Finally, even if Congress has not entirely displaced state regulation in a particular field, federal law preempts state law when it actually conflicts with federal law. A conflict will be found if it is impossible to comply with both state and federal law, or if the state law is an obstacle to fulfilling the purposes and objectives of Congress. Michigan Consol. Gas Co., 887 F.2d at 1300-1301, citing Schneidewind v. ANR Pipeline Co. (1988), 485 U.S. 293, 299-300, 108 S.Ct. 1145, 99 L.Ed.2d 316.

{¶ 81} Columbia raises three distinct claims that Ohio's different assessment rates are incompatible with FERC's pervasive regulation of wholesale sales

and interstate transportation of natural gas. We address each in turn.

{¶ 82} First, Columbia argues that the different assessment rates conflict with FERC's ratemaking authority by interfering with the ability of federally regulated pipelines to pass along costs to their customers. Columbia complains that the discriminatory nature of Ohio's tax places interstate-pipeline companies at a competitive disadvantage that requires them to discount their FERC-approved rates.[5]

{¶ 83} Columbia's argument assumes that interstate-pipeline companies and LDCs compete in the segment of the natural gas market under FERC's exclusive regulatory jurisdiction. See generally Pub. Util. Comm. of California v. Fed. Energy Regulatory Comm., 900 F.2d at 274-276 (describing FERC's jurisdiction over interstate transportation of natural gas and the states' authority over local distribution). Yet the record here fails to show any direct or significant competition between interstate-pipeline companies and Ohio LDCs for the interstate transportation of natural gas, i.e., from gathering or production areas to local distribution areas. Moreover, the evidence indicated that discounting was a function of the market and that state taxes were only one of several factors that led interstate-pipeline companies to offer discounted rates. Thus, there is no merit to Columbia's claim that Ohio's higher

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[5] According to testimony, interstate pipelines may charge no more than their FERC-approved tariffed rates but may offer rates below their full tariffs.

assessment rate conflicts with FERC's ability to regulate the rates of interstate-pipeline companies.

{¶ 84} Second, Columbia maintains that Ohio's different assessments undermine FERC policies favoring free competition in the market of natural gas gathering. However, there is no evidence here that any interstate-pipeline companies owned or operated natural gas gathering or production facilities in Ohio during the tax years in question. Thus, it is difficult to see how Columbia – or any interstate-pipeline company – was disadvantaged by a lower assessment rate on gathering facilities owned by Ohio LDCs or general businesses.

{¶ 85} Third, Columbia contends that Ohio's tax structure interferes with recent FERC efforts to encourage interstate-pipeline direct connections to end users. According to Columbia, the different assessment rates directly interfere with Columbia's ability to obtain direct connections.

{¶ 86} Yet a number of factors affect whether FERC will approve a proposed direct connection or bypass facility. These factors include, among others, the environmental impact of the proposed project, whether landowners are inconvenienced, whether economically superior alternatives are available, the existence of other transmission and distribution facilities in the area, whether system access and reliability will be enhanced by the project, and whether proposed transportation rates resulted from unfair competition or discriminatory behavior. See generally Midcoast Interstate Transm., Inc., v. Fed. Energy Regulatory Comm. (C.A.D.C.2000), 198 F.3d 960; Midwestern Gas Transm., FERC No. CP98-538-000, 1998 WL 878038.

{¶ 87} Undoubtedly, state taxes would play a role in any pipeline-construction project. However, Congress does not preempt "every state statute that has some indirect effect on rates and facilities" of interstate-pipeline companies. See Schneidewind, 485 U.S. at 308, 108 S.Ct. 1145, 99 L.Ed.2d 316. Here, Columbia has offered no credible evidence that Ohio's assessment rate on the property of an interstate-pipeline company interferes with FERC's regulation of direct connections or in any way restricts such arrangements.

{¶ 88} Accordingly, Columbia's proposition of law No. 4 is overruled.

Equal Protection

{¶ 89} Columbia contends in proposition of law No. 5 that assessing the personal property of interstate-pipeline companies at 88 percent while applying a 25 percent assessment rate to the property of Ohio LDCs and general businesses with which the interstate pipelines compete violates the Equal Protection Clauses of the United States and Ohio Constitutions.

{¶ 90} "The limitations placed upon governmental action by the federal and state Equal Protection Clauses are essentially the same." McCrone v. Bank One Corp., 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶ 7. The Equal Protection Clauses require that all similarly situated individuals be treated in a similar manner. Id. at ¶ 6.

{¶ 91} A statutory classification that involves neither a suspect class nor a fundamental right does not violate the Equal Protection Clauses if it bears a rational relationship to a legitimate governmental interest. Menefee v. Queen City Metro (1990), 49 Ohio St.3d 27, 29, 550 N.E.2d 181. Under the

rational-basis standard, a state has no obligation to produce evidence to sustain the rationality of a statutory classification. Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ. (1999), 87 Ohio St.3d 55, 58, 60, 717 N.E.2d 286. Rather, the assessment of taxes is fundamentally a legislative responsibility and a taxpayer challenging the constitutionality of a taxation statute bears the burden to negate every conceivable basis that might support the legislation. Lyons v. Limbach (1988), 40 Ohio St.3d 92, 94, 532 N.E.2d 106.

{¶ 92} Moreover, "[t]his already deferential standard 'is especially deferential' in the context of classifications arising out of complex taxation law." Park Corp. v. Brook Park, 102 Ohio St.3d 166, 2004-Ohio-2237, 807 N.E.2d 913, ¶ 23, quoting Nordlinger v. Hahn (1992), 505 U.S. 1, 11, 112 S.Ct. 2326, 120 L.Ed.2d 1. States have great leeway in making classifications and drawing lines that in their judgment produce reasonable systems of taxation. See Nordlinger, 505 U.S. at 11, 112 S.Ct. 2326, 120 L.Ed.2d 1.

{¶ 93} **Equal Protection – LDCs and Interstate Pipelines.** In Gen. Motors Corp., the Supreme Court found that there was a rational basis for treating LDCs and independent marketers differently for tax purposes. 519 U.S. at 311- 312, 117 S.Ct. 811, 136 L.Ed.2d 761. Accordingly, Columbia's claim that Ohio's tax scheme violates the Equal Protection Clauses by treating LDCs and interstate pipeline companies differently is rejected.

{¶ 94} **Equal Protection – Interstate Pipelines and Alternative-Fuel Suppliers.** Columbia also claims that the Tax Commissioner denied it equal protection

of the laws because he taxed the personal property of interstate-pipeline companies at a higher assessment rate than the personal property of Ohio taxpayers that transport "alternative fuels."[6] Columbia contends that natural gas and alternative fuels – including coal and refined petroleum products such as fuel oil and propane – are competing fuels, and that there is no rational basis for different assessment rates on interstate-pipeline companies and transporters of alternative fuels.

{¶ 95} However, "[t]he fact that one business competes with another does not, of itself, mean that the two companies are similarly situated for purposes of equal protection." GTE N., Inc. v. Zaino, 96 Ohio St.3d 9, 2002-Ohio-2984, 770 N.E.2d 65, ¶ 39. Thus, in determining whether R.C. 5727.111 deprives Columbia of the constitutional right of equal protection, we must first determine whether Columbia is similarly situated to Ohio taxpayers that transport alternative fuels. GTE N. at ¶ 23.

{¶ 96} First, the record before us contains insufficient evidence concerning the operations of those alternative-fuel suppliers with which Columbia claims to compete. Thus, because the record is not factually sufficient to make a valid comparison between the transportation and uses of alternative fuels and those services provided by interstate pipeline companies, we may reject Columbia's claim on that ground alone. See Lyons v. Limbach, 40 Ohio St.3d at 94, 532 N.E.2d 106.

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[6] One Columbia witness defined alternative fuels as a substitute for natural gas that is used for heating or for power generation.

{¶ 97} Second, Columbia, an interstate-pipeline company, has not shown that it is similarly situated to Ohio businesses that transport alternative fuels. Columbia transports natural gas interstate solely by pipeline. In contrast, the transporters of alternative fuels use several different means to transport their products, including pipelines, tanker trucks, rail cars, and barges. Distinctive features also exist among the products being transported. For instance, industrial and electric-power plants are limited in the number of hours that they can burn certain alternative fuels, such as coal and fuel oil, because of the emissions those fuels produce when burned.

{¶ 98} Third, Columbia has not negated every conceivable basis that might support the legislation. Columbia offers little more than a blanket assertion that there is no identified or apparent rational basis for the differing assessments on the property of an interstate-pipeline company and the property of a transporter of alternative fuel. Our job is simply to determine, with great deference, whether there is a rational basis for the General Assembly's taxation decisions. See Park Corp. v. Brook Park, 102 Ohio St.3d 166, 2004-Ohio-2237, 807 N.E.2d 913, ¶ 36. Each of the distinctions cited above could provide a rational basis for treating these businesses differently than interstate pipeline companies. Any variations in the costs of transportation, fuels, labor, insurance, taxes, or regulatory obligations could provide a rational basis for assessing these companies at a lower rate.

{¶ 99} Columbia raises a similar claim that Ohio's tax scheme violates equal protection because the personal property of interstate-pipeline companies

that provide natural gas gathering services in Ohio is taxed higher than the personal property of Ohio taxpayers that engage in natural gas gathering. However, between 1993 and 1998, Columbia sold all of its gathering facilities. Thus, Columbia is not within the class of taxpayers that it claims are the victims of the purportedly irrational classifications. Because Columbia is not a gatherer or producer of natural gas in Ohio, it lacks standing to attack the statute's constitutionality on the ground that it violates others' rights to equal protection. See State ex rel. Harrell v. Streetsboro City School Dist. Bd. of Edn. (1989), 46 Ohio St.3d 55, 63, 544 N.E.2d 924.

{¶ 100} Even if Columbia had standing to raise this particular equal-protection claim, Columbia has not met its burden of negating every conceivable basis that might support legislation treating these entities differently.

{¶ 101} Accordingly, Columbia's equal-protection claims lack merit and we reject proposition of law No. 5.

Conclusion

{¶ 102} The BTA erred in finding that Columbia was a natural gas company under R.C. 5727.01(D)(4) for the purpose of taxing the personal property of a public utility. The BTA failed to consider R.C. 5727.02, which establishes a primary-business test for purposes of R.C. 5727.01. Because Columbia is primarily engaged in the interstate transportation of natural gas, the Tax Commissioner correctly found that Columbia was a pipeline company under R.C. 5727.01(D)(5) and properly assessed Columbia's personal property at the 88 percent pipeline-company rate in R.C. 5727.111(D).

{¶ 103} In addition, none of Columbia's constitutional challenges have merit. Accordingly, Columbia's cross-appeal is overruled.

Decision reversed.

MOYER, C.J., and LUNDBERG STRATTON, O'DONNELL, and LANZINGER,

JJ., concur.

PFEIFER and O'CONNOR, JJ., concur in judgment only.

Jones Day, Maryann B. Gall, Phyllis J. Shambaugh, Todd Swatsler, and Kasey T. Ingram, for appellee and cross-appellant Columbia Gas Transmission Corporation.

Marc Dann, Attorney General, Barton A. Hubbard and Janyce C. Katz, Assistant Attorneys General, and Cheryl D. Pokorny, Deputy Attorney General, for appellant and cross-appellee, Tax Commissioner of Ohio.

Taft, Stettinius & Hollister, L.L.P., and Fred J. Livingstone, urging reversal for amicus curiae Ohio School Boards Association.

Thelen, Reid, Brown, Raysman & Steiner, L.L.P., and Andrea Wolfman, urging affirmance for amicus curiae Interstate Natural Gas Association of America.

OHIO BOARD OF TAX APPEALS

Columbia Gas Transmission Corp.,
Appellant,

vs.

Thomas M. Zaino, Tax Commissioner
of Ohio,
Appellee.

CASE NO. 2003-K-1876
(PUBLIC UTILITY PERSONAL PROPERTY TAX)

DECISION AND ORDER
Entered: July 28, 2006

APPEARANCES:
For the Appellant - Jones Day
Maryann B. Gall
Todd S. Swatsler
Mary Beth Young
Phyllis J. Shambaugh
Kasey T. Ingram
P.O. Box 165017
Columbus, Ohio 43216-5017

For the Appellee - Jim Petro
Attorney General of Ohio
Cheryl D. Pokomy
Assistant Attorney General
State Office Tower-16th Floor
30 East Broad Street
Columbus, Ohio 43215-3423

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

Through the present appeal, appellant, Columbia Gas Transmission Corporation, challenges a final determination of the Tax Commissioner in which he denied appellant's petitions for reassessment and affirmed public utility property tax assessments as originally issued for tax years 2000 and 2001. We now proceed to consider this matter upon appellant's notice of appeal, the statutory transcript certified by the commissioner, the record of the evidentiary hearing convened before this board, and the post-hearing briefs submitted on behalf of the parties. Consistent with the requirement imposed upon it by R.C. 5727.08, and within the extended period allowed by R.C. 5727.48, appellant filed its 2000 and 2001 annual reports with the Tax Commissioner. For each of these years, the commissioner issued preliminary assessment certificates setting forth the proposed values of appellant's taxable property to which he then applied an assessment rate of 88% of true value applicable to pipe-line companies. As previously indicated, appellant filed petitions for reassessment for both tax years 2000 and 2001, including among its arguments, that it satisfied the statutory definition of a natural gas company and was therefore entitled to have its property assessed at the 25% rate applicable to such entities beginning with the 2001 tax year, and, further, that the 88% assessment rate applied to

its property was in violation of rights guaranteed it by both the United States and Ohio Constitutions.[1]

In his final determination, the commissioner denied each of appellant's arguments and the present appeal ensued, with appellant specifying the following as error:

> "*** [2] The Commissioner's final determination is erroneous in its entirety for the following reasons:
>
> "*Specification One*
>
> "*** The assessment[s], and the final determination affirming it [them], erroneously classify Columbia Transmission as a 'pipe-line' company under R.C. 5727.01(D)(5), rather than a 'natural gas company' under R.C. 5727.01(D)(4). Columbia Transmission satisfies the definition of a 'natural gas company' in R.C. 5727.01(D)(4) and, accordingly, its taxable public utility property should be assessed at 25% of

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[1] Appellant also asserted that the value of its personal property had been overstated due to the application of the statutory cost-based valuation method set forth in R.C. 5727.1 1. The commissioner rejected this claim and appellant sought reversal of this determination through its second specification of error. However, during the course of these proceedings, the parties were able to resolve this issue, and, as a result, appellant has withdrawn this specification of error. Accordingly, it is not further addressed herein.

[2] We have omitted the numerical references attributed to the paragraphs set forth in appellant's notice of appeal.

true value, pursuant to R.C. 5727.1 11(C)(2), rather than 88% of true value as assessed by the Commissioner.

"*** R.C. 5727.01(0)(4) provides that an entity 'is a natural gas company when engaged in the business of supplying or distributing natural gas for lighting, power, or heating purposes to consumers within [Ohio] ...[.]' In the final determination, the Commissioner incorrectly found that Columbia Transmission did not supply or distribute gas directly to consumers. In fact, Columbia Transmission did supply and distribute gas directly to consumers, including but not limited to industrial end users, farm tap customers, and local distribution companies that use gas for their own consumption. Cf. Carnegie Natural Gas Co. v. Tracy (Nov. 17, 1995), 1995 WL 691943, Case No. 94-K-526, unreported.

"*** The statutory definition of 'natural gas company' in R.C. 5727.01(D)(4) is vague and ill-specified. Moreover, it overlaps with the definition provided in R.C. 5727.01(D)(5), which specifies that an entity 'is a pipe-line company when engaged in the business of transporting natural gas ... through pipes or tubing ...[.]' Any doubt in construction of these ambiguous provisions must be resolved in favor of Columbia

Transmission, Gulf Oil Corn. v. Kosvdar (1975), 44 Ohio St.2d 208, paragraphs one and two of the syllabus, which results in treating Columbia Transmission as a 'natural gas company.'

"*Specification Three*

"*** The assessment[s], and the final determination affirming it [them], violate the Commerce Clause, article I, section 8, clause 3 of the United States Constitution.

"*** Under the Commerce Clause, a state may not discriminate against or unduly burden interstate commerce. The Commissioner has assessed the taxable property of Columbia Transmission at a higher percentage of true value than comparable taxable property of other companies, including, but not limited to, local distribution companies. This disparate treatment discriminates against interstate commerce, disproportionately burdens the instrumentalities of interstate commerce, influences economic decision-making [sic] to favor entities operating intrastate, disproportionately burdens out-of-state consumers of natural gas, imposes an undue burden on interstate commerce and impedes the free flow of

natural gas in interstate commerce, all in violation of the Commerce Clause.

"*** R.C. 5727.111(D), and the 88% rate established therein, violate the Commerce Clause, both facially and as applied in this case.

"*Specification Four*

"*** By treating Columbia Transmission as a 'pipe-line company' under R.C. 5727.01(D)(5) rather than as a 'natural gas company' under R.C. 5727.01(D)(4), the Commissioner's assessment[s] and final determination violate the Due Process and Equal Protection Clauses of the United States and Ohio Constitutions.

"*** The statutory categories created by R.C. 5727.01(D)(4) and (D)(5) are vague, ambiguous, and overlapping. Columbia Transmission, although treated as a 'pipe-line company,' satisfies the statutory definition of a 'natural gas company.' Other companies, although treated as 'natural gas companies,' satisfy the statutory definition of a pipe-line company.' Similarly situated taxpayer are treated differently under these impermissibly vague statutory classifications.

"*** The statutory categories defined by R.C. 5727.01(D)(4) and R.C.

5727.01(D)(5) are unconstitutionally vague and violate the Due Process and Equal Protection Clauses of the United States Constitution and the Ohio Constitution, both facially and as applied in this case.

"*Specification Five*

"*** In determining the true value of Columbia Transmission's taxable public utility property and in assessing Columbia Transmission's taxable public utility property at 88% of true value, the Commissioner violated the Equal Protection and Due Process Clauses of the United States and the Ohio Constitutions.

"*** The Commissioner valued the taxable public utility property of others similarly situated or in competition with Columbia Transmission by using a substantially different methodology resulting in a lower true value than was applied to Columbia Transmission's property.

"*** The Commissioner assessed the taxable public utility property of others similarly situated or in competition with Columbia Transmission at a lesser percentage of true value than was applied to Columbia Transmission's property.

"*** R.C. 5727.111(D), and the 88% assessment rate established therein, violate the Due Process and Equal Protection Clauses, both facially and as applied in this case.

"*Specification Six*

"*** The assessment[s], and the final determination affirming it [them], impair, are inconsistent with, and stand as an obstacle to federal regulatory authority under the Natural Gas Act, 15 U.S.C. §§ 717-717w, and other applicable federal statutes and thus, violate the Supremacy Clause, article VI, clause 2 of the United States Constitution.

"*** R.C. 5727.111(D), and the 88% assessment rate established therein, impair, are inconsistent with, and stand as an obstacle to federal regulatory authority under the Natural Gas Act, 15 U.S.C. §§ 717-717w, and other applicable federal statutes and thus, violate the Supremacy Clause, article VI, clause 2 of the United States Constitution, both facially and as applied in this case."

As was the case before the commissioner, this appeal centers upon the appropriateness of the assessment rate applied to appellant's property for purposes of ad valorem taxation. We first dispense with the constitutional arguments which have been

advanced by appellant, responding initially to appellant's request that the board reconsider certain evidentiary rulings made during the course of the hearing convened in this matter. At hearing, appellant sought admission of evidence relating to the General Assembly's consideration and ultimate enactment of Am.Sub.S.B. 287, 148 Ohio Laws, Part V, 11536, 11549-11550 (effective December 21, 2000).[3] Although the examiner declined to admit this evidence, appellant was accorded an opportunity to proffer its evidence and to seek this board's reconsideration.

Through Am.Sub.S.B. 287, the General Assembly amended R.C. 5727.111 so as to reduce the assessment rate prescribed for property owned by natural gas companies, beginning with the 2001 tax year, from 88% to 25%. Citing to Section 17 of Am.Sub.S.B. 287, appellant notes that the changes embodied in this legislation were effected as an emergency measure in order "to provide, at the earliest possible time, for equitable taxation of participants in the natural gas markets." 148 Ohio

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[3] The evidence which was not admitted, but which appellant was permitted to proffer, consists of: (1) Ex. 25 - the May 2, 2000 written testimony of Larry L. Long, Executive Director of the County Commissioners' Association of Ohio, presented to the Senate Ways and Means Committee; Ex. 26 - the May 2, 2000 written testimony of Warren G. Russell, Deputy Executive Director of the Ohio School Boards Association, presented to the Senate Ways and Means Committee; Ex. 27 - a DVD from Ohio Government Telecommunications of the testimony before the General Assembly regarding Am.Sub.S.B. 287; and certain portions of testimony provided at this hoard's hearing by Sam Gerhardstein, appellant's current director of governmental affairs.

Laws, Part V, 11620. Appellant asserts that the evidence it sought to have admitted demonstrates not only that the General Assembly's action was in direct response to then-pending litigation involving the constitutionality of the differing assessment rates applicable to natural gas companies and general business taxpayers, [4] alleged to be in direct competition, but also that the legislature failed to achieve its own goal of "equitable taxation" by not simultaneously reducing the assessment rates for pipe-line companies, a claimed constitutional infirmity of which it and various individuals within the tax department were allegedly aware.

This board has previously expressed its reluctance to accept as evidence documents purportedly reflecting legislative intent. For example, in *Jack Schmidt Lease, Inc. v. Tracy* (July 14, 1995), BTA No. 1994-M-13, unreported, affirmed sub nom. *Zalud Oldsmobile Pontiac, Inc. v. Tracy* (1996), 77 Ohio St.3d 74, the appellant sought admission of a letter of a member of the Ohio House of Representatives regarding the legislative intent and purpose of a particular statute. This board concluded that not only did this letter constitute hearsay for which no exception applied,[5] but also that it was "irrelevant because an individual representative has no ability to

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[4] The litigation to which appellant refers is Columbia Gas of Ohio v. Tracy (Aug. 6, 1999), BTA No. 1997- K-545, unreported, docketed with the Supreme Court of Ohio as case number 99-1633, and subsequently dismissed at the taxpayer's request. See 01/12/2001 Case Announcements, 91 Ohio St.3d 1401.

[5] On appeal, the court determined that the document in question was inadmissible under either Evid.R. 803(8) or 1005.

speak for the legislature." Id. at 4. Continuing, we noted that "[e]ven without considering the layers of hearsay concerns here involved, the subsequent representations of one member of a legislative body, even the sponsor of a bill, are not probative of the intent of the body at the time of enactment of a bill. *Financial Indemnity Co. v. Cargile* (1972)[,] 32 Ohio Misc. 103.[6] Therefore, even if hearsay was not a concern, Representative Johnson's statements concerning the purposes of the bill would not be probative of intent." Id. at 5. See, also, *Glick v. Sokol*, 149 Ohio App.3d 344, 346, 2002-Ohio-4731 ("We note that Ohio has no official legislative history and, consequently, sponsor testimony is of limited value to our analysis. See *State v. Dickinson* (1971), 28 Ohio St.2d 65, 67 ***."); *Vukovich v. City of Youngstown* (Sept. 25, 1990), Mahoning App. No. 83 C.A. 198, unreported, jurisdictional motion overruled (1991), 58 Ohio St. 3d 703; *Cleveland Elec. Illum. Co. v. Cleveland* (Apr. 21, 1977), Cuyahoga App. No. 35999, unreported. Cf. *State ex rel. Foster v. Evatt* (1944), 144 Ohio St. 65, paragraph 7 of the syllabus ("Courts have no legislative authority and should not make their office of expounding statutes a cloak for

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[6] In Financial Indemnity, the court commented: "We are here involved with a question of the intent of the Legislature. Plaintiff has submitted the affidavit of a former member of the Ohio General Assembly who sponsored the bill which became the act enacting the sections of the code with which we are here concerned. This affidavit seeks to interpret the intent of the Legislature. We believe that the meaning of the act must be determined from the words of the statute itself. The court cannot consider what an individual legislator, even the author of the bill, states he understood them to mean." Id. at 106.

supplying something omitted from an act by the General Assembly. The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact. (*Slingluff v. Weaver* [(1902)], 66 Ohio St., 621, approved and followed.").

Through its proffer, appellant attempts to prove the intent of the General Assembly when it reduced the assessment rate for natural gas companies in order to support its arguments in this case challenging the constitutionality of the assessment rate left unchanged for pipe-line companies. After considering the parties' arguments, we are not persuaded that we should deviate from the rationale expressed by this board in *Jack Schmidt Lease*. The statute in question, which provides for the assessment of pipe-line company property at 88%, as opposed to the 25% assessment rate for other entities, is unambiguous and requires no further explanation. Instead, a determination regarding the constitutionality of the statute and its application can be made through a review of the express language set forth in the statute and the facts presented by the parties. Even assuming, arguendo, such evidence is admissible, appellant is not prejudiced by our ruling at this stage of the proceedings as this board is without jurisdiction to consider its constitutional claims. Rather, an appellate court with such authority may overturn this ruling and directly consider appellant's proffered evidence in the context of the arguments which have been advanced. Accordingly, appellant's motion for reconsideration is hereby overruled.

With respect to the merits of appellant's constitutional challenges, we acknowledge once again the lack of our ability to ultimately resolve such claims. See, e.g., *Cincinnati Bell Tel. Co. v. Zaino* (June 10, 2005), BTA Nos. 2003-K-765, et al., unreported. Instead, as pointed out by the Supreme Court in *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, such authority is reserved to Ohio's courts[7]:

> "The BTA understood its role to be a receiver of evidence for constitutional challenges. Accordingly, it did so, giving the parties wide latitude in presenting the evidence. The BTA determined no facts on the constitutional questions. The commissioner, however, in her Proposition of Law No. IV, contends that the BTA not only receives evidence in this type of case, but must weigh the evidence and determine the facts

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[7] Section 1, Article IV, of the Ohio Constitution provides that "[t]he judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law." Further, the Supreme Court of Ohio has expressly acknowledged that "[t]he power and duty of the judiciary to determine the constitutionality and, therefore, the validity of the acts of the other branches of government have firmly been established as an essential feature of the Ohio system of separation of powers. See, e.g., Beagle v. Palden (1997), 78 Ohio St. 3d 59, 62, "*** ('interpretation of the state and federal Constitutions is a role exclusive to the judicial branch')." State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451,462. (Parallel citations omitted.)

necessary for the court's review of the constitutional questions. Since the BTA did not make findings of fact, the commissioner asserts that we should remand the case for the BTA to comply.

"In Cleveland Gear Co. v. Limbach (1988), 35 Ohio St. 3d 229, *** paragraph three of the syllabus, we held:

"'The question of whether a tax statute is unconstitutional when applied to a particular state of facts must be raised in the notice of appeal to the Board of Tax Appeals, and the Board of Tax Appeals must receive evidence concerning this question if presented, even though the Board of Tax Appeals may not declare the statute unconstitutional. (*Bd. of Edn. of South-Western City Schools v. Kinney* 119861, 24 Ohio St.3d 184, *** construed.)'

"We explained the process, 35 Ohio St.3d at 232 ***:

"'When a statute is challenged on the basis that it is unconstitutional in its application, this court needs a record, and the proponent of the constitutionality of the statute needs notice and an opportunity to offer testimony supporting his or her view.

"'To accommodate this court's need for extrinsic facts and to provide a forum

> where such evidence may be received and all parties are apprised of the undertaking, it is reasonable that the BTA be that forum. The BTA is statutorily created to receive evidence in its role as factfinder.'
>
> "Under *Cleveland Gear*, the BTA need only receive evidence for us to make the constitutional finding. This is because the BTA accepts facts but cannot rule on the question. On the other hand, we can decide the constitutional questions but have a limited ability to receive evidence. Thus, the BTA receives evidence at its hearing, but we determine the facts necessary to resolve the constitutional question." Id. at 197- 198. (Parallel citations omitted.)

See, also, *GTE North, Inc. v. Zaino*, 96 Ohio St.3d 9,2002-Ohio-2984; *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229.

The parties were accorded an opportunity to offer evidence in support of their respective positions relating to appellant's constitutional arguments. Given this board's inability to decide such issues, appellant's arguments must be overruled at this administrative level of proceedings.

This board does, however, have the authority to address appellant's argument that it satisfies the statutory definition of a natural gas company and is therefore entitled to have its property assessed at a more favorable rate than that applied to pipe-line

companies, the classification currently applied to it by the Tax Commissioner. Beginning with tax year 2001, the General Assembly amended R.C. 5727.111 so as to establish, for the first time, different assessment rates for the property of public utilities classified as natural gas companies and pipe-line companies, 25% and 88%, respectively. See R.C. 5727.111(C) and (D). For purposes of determining which assessment rate applies, we must look to R.C. 5727.01(D), which defines both a natural gas company and a pipe-line company, providing in relevant part:

> "Any person:
>
> "* * *
>
> "(4) Is a natural gas company when engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state;[8]
>
> "(5) Is a pipe-line company when engaged in the business of transporting natural gas, oil, or coal or its derivatives

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[8] Effective June 26, 2001, the definition of a natural gas company set forth in R.C. 5727.01(D)(4) was modified to provide that a person is a natural gas company when it is "engaged in the business of supplying or distributing natural gas for lighting, power, or heating purposes to consumers within this state, excluding a person that is a governmental aggregator or retail natural gas supplier as defined in section 4929.01 of the Revised Code[.]" 149 Ohio Laws, Part II, 3857, 3896.

> through pipes or tubing, either wholly or partially within this state[.]"

Appellant argues that the preceding definitions are not mutually exclusive and that it qualifies as both a natural gas company and a pipe-line company. Acknowledging that this overlap in definitions has existed for some time, it was not until natural gas companies were accorded more favorable tax treatment that appellant was motivated to seek reclassification for tax purposes from a pipe-line company to a natural gas company.

Rejecting appellant's contentions, the commissioner commented in his final determination as follows:

> "The petitioner objects to the statutory requirement in R.C. 5727.111 that the taxable property of a 'pipe-line company' be assessed at an 88% listing percentage, rather than at the 25% listing percentage prescribed by the statute for all taxable property of a 'natural gas company.' The petitioner contends that it is a 'natural gas company' under R.C. 5727.01(D)(4) and should be assessed as a natural gas company rather than a pipeline company.[9] In furtherance of this argument, the petitioner has submitted a chart reflecting the number

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[9] The record contains varying references to both 'pipeline" and "pipe-line" companies. While both are intended to refer to the same type of entity, we will utilize the latter as it is consistent with R.C. 5727.01(D)(5).

of customers by county that are connected to its pipeline. The total exceeds 3 1,900 customers, but based on the evidence, the majority are 'farm tap customers' granted the right to tap into the pipeline at the time of construction. Based on the evidence, this contention is not well taken. The above description that the petitioner gives of its operations is the description of a pipeline company and not of a natural gas company. R.C. 5727.01(D)(4) states that a natural gas company supplies or distributes 'natural gas for lighting, power, or heating purposes to consumers within this state ...[.]' The petitioner is not supplying or distributing gas directly to consumers, but rather transporting natural gas through a network from Kentucky into the Midwest and then on to the Eastern Seaboard via pipelines. The transportation and storage services are for local gas distribution companies and industrial and commercial customers that contract for gas with producers or marketers. Therefore, the petitioner is properly classified as a pipeline company under R.C. 5727.01(D)(5). ***

"***

"Further, the petitioner does not fit the profile of a typical natural gas company. Most natural gas companies tend to

> operate in one state only, while pipeline companies tend to be interstate businesses. The Public Utilities Commission of Ohio (PUCO) regulates natural gas companies that operate within Ohio. As part of the regulation of a natural gas company, a service territory is designated. The PUCO has not designated a service territory for the petitioner since it does not recognize the petitioner as a natural gas company. FERC (the Federal Energy Regulatory Commission) publishes a listing of companies that it considers natural gas pipeline companies. The petitioner is included on the FERC list of natural gas pipeline companies. Thus, PUCO does not consider the petitioner a natural gas company, and FERC considers it a natural gas pipeline company." S.T. at 1-2.

Before this board appellant presented evidence demonstrating that a significant portion of its business involves transporting natural gas through an interstate network of pipelines and operating natural gas storage facilities inside and outside Ohio. With regard to its transportation services, appellant has pipeline in ten states, approximately 4,000 miles of which are located in Ohio, receiving natural gas at various interconnection points along its pipeline network. In providing transportation services, appellant is subject to regulation by the Federal Energy Regulatory Commission ("FERC") as a

"natural-gas company" under the Natural Gas Act. Section 717, Title 15, US. Code.[10]

All of the natural gas transported by appellant is owned by its customers and moved by appellant between points on its network designated by its customers. In providing these transportation services, appellant's customers include: "local distribution companies" ("LDCs"), which typically deliver natural gas directly to residential and commercial end-use consumers; large industrial and electric generating companies, e.g., First Energy, Pacific Gas & Electric, U.S. Gypsum, which, instead of receiving gas from an LDC, acquire it through a direct connection to appellant's pipelines; and natural gas marketers, which purchase gas from producers and sell it to end-users, but which are not subject to regulation as a utility. In addition, appellant has groups of residential and "farm tap" customers, totaling almost 32,000, who acquire direct access to appellant's pipeline system, the latter emanating typically from construction or right-of-way agreements. In addition to its natural gas transportation services, appellant also provides natural gas storage services whereby appellant

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[10] Section 717(b), Title 15, US. Code, states: The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

injects its customers' natural gas into underground wells for later withdrawal in response to seasonal demands or market variations.

Based upon the foregoing activities, appellant insists it qualifies as a natural gas company since it "suppl[ies] natural gas for lighting, power, or heating purposes to consumers within this state." R.C. 5727.01(D)(4). Appellant contends that not only do the thousands of customers it serves through direct connections to its pipeline satisfy the preceding definition, but, it also argues that the statute does not limit its terms to a final transfer of natural gas to end users. Since appellant supplies gas to LDCs and natural gas marketers which, in turn, deliver it to Ohio end-use consumers, also serves as a basis upon which it satisfies the above-quoted definition of a natural gas company.

Although the commissioner acknowledges limited instances where appellant's customers have direct connections to its pipeline network, he insists that appellant is primarily engaged in the interstate transmission of natural gas. Maintaining that appellant is appropriately treated as a pipe-line company pursuant to R.C. 5727.01(D)(5), the commissioner emphasizes the differing regulatory treatment between pipe-line and natural gas companies. Considered a transporter of natural gas in interstate commerce, appellant is subject to regulation by the FERC rather than the Public Utilities Commission of Ohio ("PUCO"). Unlike appellant, entities treated as natural gas companies by the PUCO are subject to various public service obligations, including requirements to serve all members of the public and ensure access to natural

gas, abide by approved rates, adhere to specific procedures prior to terminating service, and comply with specific reporting requirements regarding business conduct.[11]

In order to resolve whether appellant constitutes a natural gas or pipe-line company under R.C. 5727.01(D)(4) or (5), this board must determine the extent to which it is appropriate to look beyond the language set forth within the statute. Appellant argues that we need look no further than the definitions themselves, while the commissioner maintains that these definitions should be construed or interpreted in light of appellant's historical treatment as a pipe-line company, the primary nature of its business, and the differing regulatory treatment accorded natural gas and pipe-line companies. Upon consideration of the parties' arguments, we agree with appellant that the conditions clearly set forth within R.C. 5727.01(D) render it unnecessary to look to factors beyond those expressly delineated within the statute.

Making general references to the "profile of a typical natural gas company," the commissioner suggests that appellant's historical treatment as a pipe-line company have some bearing upon whether it is considered a natural gas company or a pipe-line company, questioning appellant's contention that it can qualify as both under the definitions prescribed by the legislature. The evidence before this board demonstrates that regulatory changes and increased

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[11] Although regulated by the FERC rather than the PUCO, appellant asserts that it is subject to similar regulatory requirements under the Natural Gas Act.

competitive forces have significantly altered the natural gas industry during the last three decades, blurring former distinctions which may have existed between interstate pipeline companies and LDCs. The failure of the legislature to take into consideration these developments, however, does not warrant this board's adding to or deleting from the express language of R.C. 5727.01(0)(4) and (5). As noted in *Bernardini v. Bd. of Edn.* (1979), 58 Ohio St.2d 1:

> "When this court has been called upon to give effect to an Act of the General Assembly, a standard of judicial restraint has developed when the wording of the enactment is clear and unambiguous. For example, a statute that is free from ambiguity and doubt is not subject to judicial modification under the guise of interpretation. *Crowl v. Deluca* (1972), 29 Ohio St. 2d 53, 58-59; *Slingluff v. Weaver* (1902), 66 Ohio St. 621. *** In ascertaining the legislative intent of a statute, 'It is the duty of this court to give effect to the words used [in a statute], not to delete words used or to insert words not used.' (Emphasis added.) *Columbus-Suburban Coach Lines v. Pub. Util. Comm.* (1969), 20 Ohio St.2d 125, 127; *Wheeling Steel Corp. v. Porterfield* (1970), 24 Ohio St.2d 24, 28. Furthermore, whether an act is wise or unwise is a question for the General Assembly and not this court. *Olin Mathieson Chemical Corp. v. Ontario Store* (1967), 9 Ohio St. 2d 67,

70." Id. at 6. (Footnote omitted and emphasis sic.)

Neither R.C. 5727.01(D)(4) nor (5) imposes a "primary business" test as an element in determining under which definition an entity should be classified for tax purposes. Clearly, the General Assembly is capable of setting forth such parameters in the tax area, having done so in several other instances where there exists the possibility that an organization may be engaged in multiple activities or, of a comparable nature, property may be devoted to multiple uses. See, e.g., R.C. 5701.02(C) and 5701.03(B) (defining "fixture" and "business fixture" as tangible personal property permanently attached or affixed to land, building, structure, or improvement, which "primarily benefits" the land or the business, respectively); R.C. 5709.07(A)(3) (exempting from real property tax land "used primarily for church retreats or church camping"); R.C. 5709.20 (defining various pollution control and energy-related facilities by making reference to their "primary purpose"); R.C. 5709.55 (exempting from personal property tax property used or held by a holder of a liquor permit whose "primary business" is the production of wine); R.C. 5725.01(B)(1) (defining a "dealer in intangibles" as one engaged in a business which "consists primarily of lending money" or other listed activities); R.C. 5727.01(D) (defining a person as a "telephone company" when "primarily engaged" in providing local exchange telephone service); R.C. 5727.02 (differentiating between "primary" and "incidental" business activities of various public utilities referenced within R.C. Chapter 5727.); R.C. 5733.09(D)(1) (defining a "commercial printer" for

purposes of corporate franchise tax obligations as a person "primarily engaged in the business of commercial printing").[12]

We are also not persuaded that appellant's regulation by the FERC rather than by the PUCO dictates its classification for purposes of taxation. In *Carnegie Natural Gas Co. v. Tracy* (Nov. 17, 1995), BTA No. 194-K-526, unreported, this board concluded that the taxpayer was entitled to a refund of corporate franchise tax it had paid because it met the definition of a natural gas company set forth in R.C. 5727.01 and was therefore exempt from such tax.[13] Rejecting arguments similar to those advanced in this appeal, ie., that the applicable taxing statutes be construed so as to take into consideration whether the taxpayer was regulated by the PUCO, this board held:

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[12] There have been instances in which the Supreme Court has developed its own "primacy," or "true object," test where none was expressly imposed by statute. See, e.g., *Emery Industries, Inc. v. Limbach* (1989), 43 Ohio St.3d 134 (construing *Accountant's Computer Serv. v. Kusydar* (1973) 35 Ohio St.2d 120, and concluding that in order to determine whether a "mixed transaction" involving the rendition of a personal service and the transfer of tangible personal property was subject to sales/use tax, it was necessary to ascertain whether the services rendered were a consequential or inconsequential aspect of the transaction). However, where terms and conditions are clearly set forth by statute, the court has been reluctant to amplify such terms and conditions. See, e.g., *SCM Chemicals, Inc. v. Zaino*, 106 Ohio St.3d 43, 2005-Ohio-3676; *Elkem Metals Co., L.P. v. Washington Cty. Bd. of Revision* (1998), 81 Ohio St.3d 683; *Bernardini, supra*.

[13] In *Carnegie Natural Gas, supra*, the definitions of natural gas and pipeline companies were set forth in former R.C. 5739.01(E)(4) and (5).

"In considering the Tax Commissioner's final determination, in which he relied extensively upon the absence of appellant's regulation by the PUCO, we refer to the admonition found in a portion of the court's syllabus in *State, ex rel. Foster v. Evatt* (19441, 144 Ohio St. 65:

"'7. Courts have no legislative authority and should not make their office of expounding statutes a cloak for supplying something omitted from an act by the General Assembly. The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact. (*Slingluff v. Weaver* [(1902)], 66 Ohio St., 621, approved and followed.)

"'8. There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation net provided for.'

"See, also, *Wheeling Steel Corp. v. Porterfield* (1970), 24 Ohio St.2d 24, 27-28 (holding 'neither the Board of Tax Appeals, nor this court, may legislate to add a requirement to a statute enacted by the General Assembly.')[.]

"Given the similarity between the definitions set forth at 5727.01(E)(4) and (5) and those found in R.C. 4905.03(A)(6)

and (7), under certain circumstances, it may be appropriate to consider the PUCO's interpretation and application of the latter statutes when determining the effect of the former. See *Akron Transp. Co. v. Glander* (1951), 155 Ohio St. 471; *Chrysler [Corp v. Tracy* (Jan. 21, 1994), BTA No. 1991-K-1523, unreported, affirmed (1995), 73 Ohio St.3d 26].

However, neither R.C. 5733.09 [n]or R.C. 5727.01 condition the status of a company as a public utility for purposes of exempting it from the imposition of franchise tax upon its regulation by the PUCO. Additionally, appellant has suggested that the PUCO may actually be preempted from such regulation by virtue of the Natural Gas Act. See 15 U.S.C. section 717, et seq.; Brief of Appellant at 9 (collecting case[s]). Accordingly, we proceed to determine whether appellant qualifies as a natural gas company, or in the alternative, a pipe-line company as expressly defined by R.C. 5727.01(E)." Id. at 14-16.

Cf. *Marano v. Gibbs* (1989), '45 Ohio St.3d 3 10, 3 11 ("The definitions of a 'public utility' set forth in R.C. 4905.02,4905.03 and 5727.01 are not exclusive since those definitions are relevant solely to the statutory chapters in which they are located. *Vernon v. Warner Amex Cable Communications, Inc.* (1986), 25 Ohio St.3d 117, 119 ***."); *Continental Cablevision of*

Ohio, Inc. v. Tracy (July 10, 1998), BTA Nos. 1996-K-6, et a]., unreported, at 38, fn 12.

Had it been the intent of the General Assembly to define a natural gas company or a pipe-line company on the basis of whether it is regulated by the FERC or the PUCO, it could easily have included such analysis as a determining factor. It chose not to do so and this board will not amplify the terms of R.C. 5727.01(D) to now achieve such a result. *Shell v. Ohio Veterinary Med. Licensing Bd.,* 105 Ohio St.3d 420,729, 2005-Ohio-2423 ("For that reason, it does seem plausible, perhaps even probable, that the General Assembly did intend the notice provision not to apply when the board conducts investigatory inspections. However, the strongest indication of the General Assembly's intent is the language it uses in a statute. ***"); *Vought Industries, Inc. v. Tracy* (1995), 72 Ohio St.3d 261, 265-266 ("The first rule of statutory construction is that a statute which is to be applied, not construed. 'There is no authority under any rule of statutory construction to add to, enlarge, supply, expands, extend or improve the provisions of the statute to meet a situation not provided for.' *** Our obligation is to apply the statute as written. ***").

Even disregarding appellant's contention that its delivery of natural gas to LDCs and natural gas

marketers qualifies it as a natural as company,[14] the record demonstrates that it directly supplies natural gas to industrial, power-generating, residential, and farm customers for the purposes delineated in R.C. 5727.01(D)(4). While it may indeed also satisfy the definitional elements of a pipe-line company, its election to not previously challenge its treatment is reasonable given the prior similarities in their treatment for tax purposes. However, having now successfully demonstrated that it is indeed a natural gas company as defined by R.C. 5727.01(D)(4), appellant is entitled to have its property assessed at the listing rate prescribed for such entities.

Consistent with the preceding discussion, and to the extent within this board's jurisdiction, appellant's first specification of error is well taken and is sustained. The remainder of appellant's specifications are beyond this board's jurisdiction and must therefore be overruled. Accordingly, it is the order of this board that the Tax Commissioner's final determination, consistent with foregoing discussion, is hereby reversed.

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[14] We question whether the distribution of natural gas to LDCs and natural gas marketers, which themselves do not consume such gas for their own lighting, power, or heating purposes, would qualify appellant as a natural gas company under R.C. 5727.01(D)(4). See *Chrysler Crop. V. Tracy* (19950, 73 Ohio St.3d 26. However, given the other entities to which appellant supplies natural gas for these purposes, we need not make such determination.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.

_____

Julia M. Snow, Board Secretary

Columbia Gas Transmission Corporation
200 Civic Center Drive
Columbus, Ohio 43215

Re: Case Nos. 01-01849 & 01-05338
Public Utility Property Tax
Various Ohio Companies
Tax Years: 2000 and 2001

FINAL DETERMINATION

This is the final determination of the Tax Commissioner on two petitions for reassessment pursuant to R.C. 5727.47. A hearing was held on these matters.

The petitioner "operates an interstate gas pipeline network extending from Kentucky to the Midwest and the Eastern Seaboard. In addition, Columbia Transmission operates an underground natural gas storage system." The subject assessments were issued as the result of the petitioner filing its 2000 and 2001 Annual Ohio Public Utility Property Tax Natural Gas Pipeline Company Reports. Timely petitions for reassessment were filed raising several constitutional arguments. Furthermore, the petitioner also raised an issue with respect to the valuation of the Ohio taxable property proposing that appraisal information would establish a more accurate value for its property.

The petitioner believes that the assessments at issue violate its due process and its right of equal protection. Additionally, the petitioner contends that the assessments violate its rights under the

Commerce Clause and are in violation of the Supremacy Clause of the U.S. Constitution. Specifically, it contends that "the taxable personal property of others similarly situated or in competition with Columbia Transmission was assessed at a lesser percentage of true value and/or the Commissioner valued and assessed the taxable property of others similarly situated or in competition with Columbia Transmission by using a substantially lower true value than was applied to Columbia Transmission's property."

The petitioner objects to the statutory requirement in R.C. 5727.111 that the taxable property of a "pipeline company" be assessed at an 88% listing percentage, rather than at the 25% listing percentage prescribed by the statute for all taxable property of a "natural gas company." The petitioner contends that it is a "natural gas company" under R.C. 5727.01(D)(4) and should be assessed as a natural gas company rather than a pipeline company. In furtherance of this argument, the petitioner has submitted a chart reflecting the number of customers by county that are connected to this pipeline. The total exceeds 31,900 customers, but based on the evidence, the majority are "farm tap customers" granted the right to tap into the pipeline at the time of construction. Based on the evidence, this contention is not well taken. The above description that the petitioner gives of its operations is the description of a pipeline company and not of a natural gas company. R.C. 5727.01(D)(4) states that a natural gas company supplies or distributes "natural gas for lightening, power, or heating purposes to consumers within this state. . ." The petitioner is not supplying or distributing gas directly to consumers, but rather transporting

natural gas through a network from Kentucky into the Midwest and then on to the Eastern Seaboard via pipelines. The transportation and storage services are for local gas distribution companies and industrial and commercial customers that contract for gas with producers or marketers. Therefore, the petitioner is properly classified as a pipeline company under R.C. 5727.91(D)(5). This conclusion is supported by one of the petitioner's Vice President's testimony at the hearing conducted in this case.

In response to the question: "What does 'unbundle' mean", Carl Levander, Vice President, Regulatory & Strategic Initiatives, stated:

> When I started with Columbia, the bulk of its business involved the sale of gas. Generally, producers sold their gas to interstate pipelines such as Columbia, which in turn sold it to local distribution companies. Interstate pipelines provided a product that included both the gas itself and the transportation and storage required to deliver it. The regulatory changes required that those components be separated from each other, ultimately leading to Columbia exiting the business of buying and selling gas. Now, Columbia Gas Transmission is not involved in buying and selling the commodity of natural gas itself, and instead provides only transportation and storage services.

Further, the petitioner does not fit the profile of a typical natural gas company. Most natural gas companies tend to operate in one state only, while pipeline companies tend to be interstate businesses. The Public Utilities Commission of Ohio (PUCO) regulates natural gas companies that operate within Ohio. As part of the regulation of a natural gas company, a service territory is designated. The PUCO has not designated a service territory for the petitioner since it does not recognize the petitioner as a natural gas company. FERC (the Federal Energy Regulatory Commission) publishes a listing of companies that it considers natural gas pipeline companies. The petitioner is included on the FERC list of natural gas pipeline companies. Thus, PUCO does not consider the petitioner a natural gas company, and FERC considers it a natural gas pipeline company.

Next, the petitioner has submitted documentation of Ohio natural gas companies that have transmission equipment listed in their PUCO reports. Therefore, the petitioner contends, there are natural gas companies that are competing with it for customers to transport natural gas. As these competitors are listing their property at 25% instead of the 88% at which the petitioner is required to report its property, the petitioner contends that there is an equal protection issue. However, while some intrastate competition may exist for transportation of gas, the local distributing companies (LDC's) are restricted in transporting gas. They are under the PUCO's regulatory authority, not FERC's. Once again, the separation of natural gas companies and pipeline companies has a basis in fact and must stand.

As noted above, the petitioner contends that the assessment violates the Equal Protection and Due Process Clauses of the United States and Ohio Constitutions. The petitioner cites, among other cases, *Allied Stores of Ohio v. Bowers* (1959), 358 U.S. 522 and *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195 in support. Also, the petitioner contends that the assessment violates the Commerce Clause and the Supremacy Clause of the United States Constitution. Various cases are cited in support of the argument that the taxing scheme discriminates against interstate commerce and interferes with the FERC's authority. These contentions are not well taken.

In *Gen. Motors Corp. v. Tracy* (1997), 519 U.S. 278, the United States Supreme Court reviewed the issue of whether Ohio could impose a sales tax on natural gas sold by producers and independent marketers to their customers, and not impose a sales tax on gas sold by LDC's to its customers. The Court held that the different tax treatment was justified and did not violate the Commerce Clause and the Equal Protection Clause of the United States Constitution, because the LDC's are substantially different entities from other natural gas vendors. The Court found that an LDC is a typical natural gas company because it primarily distributes to residential gas customers through its extensive distribution system, while marketers and producers are not natural gas companies because they do not distribute gas to residential customers and do not own their own distribution system. Likewise, in the instant case, the petitioner is not similarly situated to the LDC's in Ohio that are classified as natural gas companies under R.C. 5727.01(D)(4). The LDC's distribute gas

through their distribution systems to residential and business customers, while the petitioner does not own a distribution system with which to serve residential and business customers, and instead provides transportation and storage services for LDC's and large industrial customers. The existence of farm tap customers does not make the petitioner an LDC. The connections are a convenience to the landowners and not part of a customer distribution system of a natural gas company.

Similarly, an argument regarding the Equal Protection Clauses of the United States and Ohio Constitutions was raised in *GTE North, Inc. v. Zaino* (2002), 96 Ohio St.3d 9. The Supreme Court of Ohio upheld the different classifications of companies and different listing rates established by the General Assembly in R.C. 5727.01 and R.C. 5727.111.

The petitioner contends that the "assessment impairs and is inconsistent with federal regulatory authority under applicable federal statutes and thus, violates the Supremacy Clause, article VI, clause 2 of the U.S. Constitution." The petitioner is contending that Ohio tax law is hindering federal objectives of the FERC regulations. This contention is not well taken. There is no inconsistency between FERC regulation and Ohio's tax statutes. The Federal Energy Regulatory Commission regulates the operation of interstate pipelines such as the petitioner, while the Ohio statutes at issue pertain to determining the value of business property for tax purposes. There is no impairment of the FERC regulations or FERC goals and objectives by Ohio's taxation of the petitioner's assets. Simply, since the petitioner engages in business and uses tangible

personal property in business in Ohio it has become subject to the public utility property tax as imposed pursuant to the applicable taxing statutes in this state. Notwithstanding the existence of numerous customers of the petitioner and the existence of transmission property in the hands of several natural gas companies (LDC's), the petitioner continues to meet the definition of a pipeline company and shall be taxed accordingly.

The subject assessment was issued under the authority of various sections of the Ohio Revised Code, including R.C. 5727.01 and 5727.111, which require taxpayers meeting the definition of a pipeline company to have their taxable personal property assessed at 88% of true value. A review of the file in this case shows that the Tax Commissioner properly assessed the petitioner under the appropriate provisions of the Revised Code. Furthermore, the petitioner has not provided any substantive evidence to show that any improper assessment was issued and finally, the Tax Commissioner is without jurisdiction to decide constitutional issues. See *Cleveland Gear Co. v. Limbach* (1983), 35 Ohio St.3d 229.

The petitioner has raised a valuation issue based on appraisal information submitted after the hearing on this matter. A review of that information reflects that the petitioner contends that the Tax Commissioner's prescribed true value computation overvalues its taxable property. The appraisal documents a total taxable value of $215,850,310 for tax year 2000 and $217,872,800 for tax year 2001 whereas the value determined upon assessment was $241,513,740 for tax year 2000 and $240,365,580 for

tax year 2001. The appraisal methodology and several of the factors relied on by the petitioner are inconsistent with other appraisals reviewed and adjusted by the Tax Commissioner. The petitioner has applied a capitalization rate to the formula, which uses a flotation element, which the Tax Commissioner has previously rejected. Furthermore, in estimating the net operating income, the petitioner has used a simple average when a better estimate can be obtained by using a combination of simple, weighted and trended estimates. Finally, in arriving at the overall system value of the company by combining the values determined by the cost and income approaches, the petitioner only attached a weighting of 10% to the cost approach. This weighting of 10% on the cost approach would be adjusted because it places almost total emphasis on the income approach and disregards the cost approach. The determination of true value for Ohio personal property tax purposes has historically relied on the cost as recorded on the books and records as the beginning point in determining true value. Often times using an income approach results in no value being assigned to a business's tangible personal property because the business has net operating losses. However, this dies not mean that the tangible personal property has no value. Because the income approach can be unreliable in the determination of true value, the weighting attached to the appraisal cost approach in determining the overall system value would be increased to place more emphasis on cost and less on income.

In *Texas Eastern Transmission Corp. v. Tracy* (1997), 78 Ohio St.3d 83, the Ohio Supreme Court held that an alternate valuation method may be

considered to determine true value when such a method is more accurate than the statutory cost-based approach of R.C. 5727.11. In the instant case, for the reasons given in this final determination, the appraisals submitted by the petitioner are not a more accurate gauge of true value of the petitioner's property than the assessed value for each year at issue.

Accordingly, the assessments are affirmed.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THESE MATTERS. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THESE MATTERS WILL BE CONCLUDED AND NOTICE OF SUCH FINAL DETERMINATION WILL BE SENT PURSUANT TO R.C. 5727.47 TO THE APPROPRIATE COUNTY AUDITORS, WHO SHALL PROCEED IN ACCORDANCE WITH R.C. 5727.471.

I HEREBY CERTIFY THE FOREGOING
TO BE A TRUE AND CORRECT COPY OF
THE ACTION OF THE TAX COMMISSIONER
TAKEN THIS DAY WITH RESPECT TO THE
ABOVE MATTER.

//s// _____
Thomas M. Zaino

Tax Commissioner

Supreme Court, U.S.
FILED
DEC 1 - 2008
OFFICE OF THE CLERK

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No. 07-1554

In the Supreme Court of the United States

COLUMBIA GAS TRANSMISSION CORP.,
Petitioner,

v.

RICHARD A. LEVIN,
TAX COMMISSIONER OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NANCY H. ROGERS
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
STEPHEN P. CARNEY
Deputy Solicitor
BARTON HUBBARD
Assistant Attorney General
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Respondent
Richard A. Levin, Tax
Commissioner of Ohio

QUESTIONS PRESENTED

May a State, consistent with the Commerce Clause, impose tax rates on state-regulated natural gas companies that differ from tax rates on interstate pipeline companies, given the different core market that each serves and the different regulatory structure that applies to each, notwithstanding some incidental competition between the two types of entities?

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INTRODUCTION

This case does not warrant review because it involves the application of settled law to a particular set of facts. The Court has already ruled that States may tax different types of participants in the natural gas industry in different ways without offending the dormant or negative Commerce Clause. *General Motors Corp. v. Tracy*, 519 U.S. 278, 310 (1997) ("*Tracy*"). In *Tracy*, the Court explained that entities may demand equal tax treatment only relative to "similarly situated" entities, while differently situated entities may be taxed differently. *Id.* at 298-99. The Court applied that principle to the different types of companies whose sales were at issue in *Tracy*. The Court concluded that the State could offer unique tax treatment to State-regulated public utilities, called "local distribution companies," or LDCs. Those LDCs alone sold the "bundled product" of natural gas as a commodity along with delivery of the gas, and LDCs alone were legally bound to meet certain duties, such as serving as a "provider of last resort," along with selling gas to residences and other consumers. *Id.* at 301, 306. The other sellers at issue, called "independent marketers," were fundamentally different from, and thus not "similarly situated" to, the LDCs, because the independent marketers sold gas on an open market and were not subject to the same regulations or duties as LDCs. *Id.* at 310. Thus, the State could treat the two entities differently.

Petitioner, Columbia Gas Transmission Corp. ("Columbia Transmission" or "Columbia"), asks the Court to revisit *Tracy* because, Columbia says, the regulatory regime and gas market have changed so much that a new result is warranted. Petition

("Pet.") at 4-9, 15. But Columbia overstates the minor changes since *Tracy* and misapprehends *Tracy*'s meaning. As explained below, *Tracy* was based on broad principles that are still true today; it did not turn on the minor points that Columbia insists were critical. Moreover, even if LDCs and independent marketers are, as Columbia says, closer to being similarly situated than they were in *Tracy*, that would not help Columbia. Columbia is not a marketer, but is instead a "pipe-line company" under Ohio's public utility and tax laws. Columbia Transmission, like other interstate pipeline companies, or IPCs, primarily transports natural gas across the nation, from production wells and gathering lines to local "distribution" pipeline systems, at which point the pipeline companies' connection with the natural gas ends. IPCs today are even more dissimilar from LDCs than independent marketers were in *Tracy*. Thus, *Tracy* squarely governs this case and validates the different tax treatment at issue, and nothing about this case warrants further review, let alone a different result on the merits.

In addition, Columbia's half-hearted attempt to show a division of authority falls flat, because the sole case it cites does not conflict in any way with the Ohio Supreme Court decision below. See Pet. at 21 (citing *In re CIG Field Servs. Co.*, 112 P.3d 138 (2005)); see also *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St. 3d 122 (2007), Pet. App. 1a. Nor does Columbia's appeal to policy and congressional intent aid its cause, as Congress has not acted—though it could—in response to *Tracy* or the alleged market changes.

Finally, this case is not a good vehicle to review the threshold issue of "similarly situated" entities, as Columbia's claim surely would fail even if it overcame the hurdles identified above. First, LDCs and IPCs end up paying similar taxes, despite the property tax difference, because LDCs—but not IPCs—pay a separate "MCF tax" based on the volume of gas they sell, and the Court has long recognized that "compensatory taxes" may be considered in weighing whether seeming discrimination is balanced out by other taxes. *Tracy*, 519 U.S. at 309. In fact, Ohio's General Assembly imposed this new MCF tax on LDCs in the same legislation that cut LDCs' personal property tax rate from 88 to 25 percent, and it described this trade-off as a "revenue neutral" measure.

Second, Congress has expressly blessed State discretion over issues such as this, negating any dormant Commerce Clause argument. As the Court noted in *Tracy*—though it was not placed at issue there—Section 1(b) of the Natural Gas Act of 1938 ("NGA"), 15 U.S.C. § 717(b), exempts preferential State tax treatment of LDCs from dormant Commerce Clause challenges. Thus, even were Columbia to overcome its other obstacles, it eventually would hit this wall.

For these and other reasons below, the Court should deny the Petition.

REASONS TO DENY THE WRIT

A. The decision below does not conflict with *GM v. Tracy*, because the relevant legal framework and facts have not changed.

Columbia Transmission's primary argument for review is its insistence that the natural gas market has changed in such drastic ways that the Court should revisit its 1997 decision in *GM v. Tracy*. In particular, Columbia insists that the new competition in the residential market between LDCs and independent marketers so erodes the basis of *Tracy* that it can no longer be said that *interstate pipeline companies* such as Columbia are not similarly situated to LDCs. Columbia also urges that the slight potential or actual competition between IPCs and LDCs makes them similarly situated.

As detailed below, Columbia is wrong. First, the Court based *Tracy* on several factors that remain valid today, despite the competition between LDCs and marketers in the residential market. *Tracy* did not turn solely on the then-monopoly that LDCs had in the residential market. Second, LDCs and IPCs are not similarly situated. LDCs remain fundamentally different from all other entities, whether IPCs or marketers, as only LDCs sell the bundled product of gas and gas delivery, and only LDCs must satisfy the many duties that Ohio's public utility regulations impose on them. Moreover, IPCs cannot enter the LDCs' core market, even if marketers may, and in light of that major difference, any marginal competition between LDCs and IPCs is irrelevant.

1. *Tracy* did not turn solely on the LDCs' then-monopoly over natural gas sales to residences, but instead was based on several factors that remain true, such as the LDCs' unique duties to consumers and institutional concerns about judicial intervention.

Columbia Transmission's argument rests entirely on a misreading of *Tracy*, and correcting that misreading leaves little to nothing left of its argument for revisiting *Tracy*. Columbia says that *Tracy*'s "determination that LDCs were not 'similarly situated' to independent gas marketers was driven *exclusively by the fact that LDCs served as monopoly suppliers* to a captive residential market, a fact that is no longer true." Pet. at 15 (emphasis added). But Columbia is wrong: *Tracy* rested on several factors, including LDCs' unique role in serving residential consumers, and the monopoly status was just one component. More important was that LDCs had State-imposed legal duties toward those consumers, and equally important was the Court's concern about the judiciary's inability, and Congress's superior ability, to assess the economic policies and predictions involved in these issues.

The *Tracy* Court began its analysis by explaining that "any notion of discrimination assumes a comparison of substantially similar entities," *Tracy*, 519 U.S. at 298, and thus "when the allegedly competing entities provide different products, as here, there is a threshold question whether the companies are indeed similarly situated for constitutional purposes." *Id.* at 299. The Court acknowledged that the LDCs and independent

marketers might compete in the commercial and industrial markets, *id.* at 302, and it further noted that "[e]liminating the sales tax differential at issue" could "intensify competition between LDCs and marketers for customers in [the industrial] noncaptive market." *Id.* at 303. But on the other hand, the Court noted that the LDCs and marketers did not compete in the LDCs' core market of serving residential consumers. Thus, the Court had to decide whether to "accord controlling significance to the noncaptive market in which they compete, or to the noncompetitive, captive market in which the local utilities alone operate." *Id.*

In concluding that the residential market was the relevant one, the Court noted several factors. It did, as Columbia stresses, note the captive nature of the LDC market. But the Court also noted, along with the LDCs' monopoly status, that State regulation imposed many duties on LDCs. The Court explained that "State regulation of natural gas sales to consumers serves important interests in health and safety in fairly obvious ways, in that requirements of dependable supply and extended credit assure that individual buyers of gas for domestic purposes are not frozen out of their houses in the cold months." *Id.* at 306. As explained below, LDCs alone retain these duties under Ohio law today. The important point here, regarding *Tracy's* meaning, is that the Court relied not merely on the LDCs' monopoly status per se, but on the duties that accompanied that status, as those duties serve State interests.

The Court summarized this concern as "an obligation to proceed cautiously lest we imperil the

delivery by regulated LDCs of bundled gas to the noncompetitive captive market." *Id.* at 304. This statement, to be sure, includes the word "captive," but the broader concern reflected here is the need to preserve LDCs' provision of gas to residences. Today's "changed" world still relies solely on the LDCs as the entities *guaranteed* to meet that need, so the fact that interstate marketers also might meet that need—but are not required to—cannot be said to undermine the entire basis for *Tracy*.

Equally important, the Court in *Tracy* stressed the relative institutional weakness of courts, as opposed to Congress, in assessing the effects of altering State regulation or taxation of the natural gas market. The Court explained that "as a Court we lack the expertness and the institutional resources necessary to predict the effects of judicial intervention invalidating Ohio's tax scheme on the utilities' capacity to serve this captive market." *Id.* By contrast, explained the Court, Congress is better suited to the task, because it "has both the resources and the power to strike the balance between the needs of the competitive and captive markets." *Id.*

The Court's latter concern—namely, that Congress can assess this issue better than the Court can—is of course not affected by the presence of competition between LDCs and independent marketers. As the market evolves, Congress remains able to step in and use its Commerce Clause powers to make whatever changes it thinks necessary. Congress has not acted. Indeed, while Columbia Transmission makes much of its view of congressional intent, see Pet. at 23-29, it does not explain why Congress cannot fix the alleged problem

here. (In addition, as detailed below, Congress has maintained an express exemption from Commerce Clause challenge of differential treatment such as the tax rates at issue here.)

Thus, *Tracy* turned on more than the LDCs' monopoly status, and the other key factors—as well as the delivery part of the monopoly—remain unchanged.

2. Interstate pipeline companies, such as Columbia Transmission, are not similarly situated to LDCs.

IPCs, such as Columbia Transmission, differ from LDCs in at least two dispositive ways. First, only the LDCs are legally obligated to meet several public utility obligations, so LDCs remain unique entities even though independent marketers compete with LDCs in the residential market. Second, legal restrictions and practice limitations prevent IPCs from entering the LDCs' core residential market. Because IPCs are categorically excluded from competing with LDCs in the relevant market, any marginal competition in other markets is irrelevant.

a. Ohio's LDCs retain unique duties toward residential consumers, reflecting the State's interest in citizens' welfare.

LDCs have distinct duties that keep them from being similarly situated to any other entities in the natural gas market, whether independent marketers or IPCs. Columbia Transmission reluctantly acknowledges this truth but seeks to minimize it, conceding only that "the LDCs still retain some vestigial obligations from their time as a monopoly

supplier, such as an obligation to serve as a provider of last resort." Pet. at 7. But what Columbia dismisses as "vestigial obligations" are a comprehensive web of duties ensuring that "individual buyers of gas for domestic purposes are not frozen out of their houses in the cold months." *Tracy*, 519 U.S. at 306. Equally important, *only* LDCs have these obligations; neither independent marketers nor IPCs, such as Columbia, share these burdens.

Ohio law requires LDCs to meet several obligations, all of which ensure that consumers' natural gas needs are met.[1] Specifically, LDCs must do all of the following:

- Serve all members of the public and ensure access to natural gas for residential, commercial, and industrial consumers alike without discrimination, Ohio Rev. Code §§ 4905.03, 4905.06, 4905.35, Pet. App. at 26a, ¶ 69; *Tracy*, 519 U.S. at 297;

- Guarantee a supply of natural gas for all consumers at all times—and to do so, LDCs must commit to costly long-term purchase and storage contracts at "just and reasonable rates," for which they may not earn a rate of return on the gas they purchase, but, instead, may recover

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[1] Ohio's tax and public utility laws refer to these companies as "natural gas companies," but the term LDC is commonly used in the natural gas industry, and the Court used the term LDC in *Tracy* to refer to these entities. See Ohio Rev. Code §§ 5727.01(D)(4) and 4905.03(A)(6); *Tracy*, 519 U.S. at 282.

only the reasonable purchase costs, Ohio Rev. Code §§ 4905.22, 4905.302; Ohio Adm. Code Chapter 4901:1-14;[2] Pet. App. at 26a, ¶¶ 68-69; *Tracy*, 519 U.S. at 297;

- Protect all Ohio natural gas consumers by acting as default providers, or "providers of last resort," when an alternative supplier fails to provide service, Ohio Rev. Code § 4905.302(C)(2), Ohio Adm. Code 4901:1-27-12(G), (H), and (J); Pet. App. at 26a, ¶ 69; *Tracy*, 519 U.S. at 297;

- Follow certain administrative procedures before terminating services and avoid terminating service for non-payment in winter to low-income, elderly, and handicapped residential customers, Ohio Rev. Code §§ 4933.12, 4933.122; Pet. App. at 26a, ¶ 69; *Tracy*, 519 U.S. at 297;

- Abide by reporting and other stringent requirements on the conduct of their business, Ohio Rev. Code §§ 4905.14, 4905.40, 4905.41, 4905.48, 4935.04; Pet. App. at 26a, ¶ 69; *Tracy*, 519 U.S. at 297.

All of these duties, again, are *unique* to LDCs, and the new system of residential-market competition between LDCs and independent

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[2] See, e.g., *Vectren Energy Delivery of Ohio, Inc. v. PUCO*, 863 N.E. 2d 599 (2007) (applying the "gas cost recovery process" established under Ohio Adm. Code Chapter 4901:1-14).

marketers does not change that fact. True, as Columbia notes, Ohio now allows independent natural gas marketers to compete with LDCs in the retail sale of natural gas to residential and business consumers. See Ohio Rev. Code § 4929.01 *et seq.* But while Columbia seems to suggest that these largely unregulated marketers do so on equal footing with the LDCs, that is simply not the case. The marketers may compete to sell gas to residents, but they do not carry LDCs' obligations. That is so because, unlike LDCs, Ohio's natural gas marketers, whether independent from or affiliated with an LDC, are not "public utilities" under Ohio's regulatory law. Ohio Rev. Code § 4929.01(G) and (N) (excluding natural gas marketers from the definition of "natural gas company"); Ohio Rev. Code § 4929.03 (exempting all but "natural gas compan[ies']" activities from jurisdiction of Public Utilities Commission of Ohio ("PUCO")).

Not only are independent marketers not subject to the regulatory burdens, and attendant costs, of serving as the provider of last resort, but equally important, independent marketers are free of the strict economic limitations that PUCO imposes on LDCs. Those rules bar LDCs from making any profit on their natural gas sales. Independent marketers, by contrast, are free to earn a rate of return on their gas sales at whatever the market will bear. Ohio Rev. Code § 4929.02(A); *Chrysler Corp. v. Tracy*, 73 652 N.E. 2d 185, 186 (1995) (citing *In re Application of Yankee Res. Resources, Inc.* (Sept. 9, 1982), PUCO No. 82-1086-GA-ARJ, unreported). That alone would justify differential tax treatment.

In addition, the LDCs and independent marketers do not sell the same product, as independent marketers sell only gas as a commodity, while the LDCs sell the bundled product of gas along with delivery of that gas. That is, marketers do not sell delivery-to-end-user transportation services; rather, they contract with residential and business consumers to sell natural gas that the marketers have purchased from others or produced themselves. Pet. App. at 27a, ¶ 71. LDCs still perform the delivery function for all of the marketers' residential customers and all but a few of the marketers' large industrial and commercial customers that have their own pipeline distribution systems. *Id.* Because the marketers sell only the gas itself, while the LDCs sell a bundled product of the gas itself along with delivery, the competition between marketers and LDCs is only partial.

Thus, even if *Tracy* turned primarily on the LDCs' monopoly status (and it did not), that status continues, as LDCs retain their monopoly over delivery to residential consumers. That is, even when independent marketers sell the gas to residents, the marketers need the LDCs to deliver the gas, because only the LDCs have the infrastructure of pipes leading into homes. And again, the LDCs' retained monopoly on delivery also means that only LDCs can sell the bundled product of gas *and* delivery.

Finally, even if one accepts the (mistaken) premise that LDCs and independent marketers are similarly situated, that does not help Columbia Transmission, which is an IPC, not a marketer. At most, Columbia's argument would support an anti-

discrimination mandate as between LDCs and marketers. And notably, although not at issue here, Ohio did assess marketers' personal property, for the tax and tax year at issue here, at the same level—namely, on 25 percent of the property's assessed value—that applied to LDCs' property. See former Ohio Rev. Code § 5711.22 (Page's 2001). That is, LDCs and marketers were treated the same (at least regarding the tax and years at issue), while IPCs such as Columbia have been the odd man out. And, as explained below, IPCs differ from both LDCs and independent marketers so greatly that equating IPCs and LDCs as "similarly situated" is not plausible.

b. IPCs cannot enter the LDCs' core market, and any marginal competition in minor markets is irrelevant.

As noted above, Columbia Transmission is not an independent marketer, so it is not one of the entities that now competes with LDCs in the residential market. In stark contrast, Columbia Transmission is an IPC, an interstate pipeline company, and for reasons both legal and practical, it cannot enter the LDC market. That, in turn, means that it is not similarly situated to LDCs in the market that matters under *Tracy*.

Columbia Transmission, as an IPC (or "pipe-line company" under Ohio law) is primarily in the business of transportation or "transmission" of natural gas. That includes the tasks of gathering gas and collecting it at production areas, transporting it across the country or States as needed, and then transferring the gas to local

distribution pipeline facilities, such as those owned and operated by Columbia's LDC affiliate, Columbia Gas of Ohio. In turn, Columbia Gas of Ohio and other LDCs then deliver the gas to end-user customers. But Columbia does not, and cannot, sell gas to residences as LDCs do. Several legal and factual issues keep the IPCs from being similarly situated to LDCs.

First, federal regulations, as promulgated by the Federal Energy Regulatory Commission ("FERC"), prevent IPCs from making retail sales to consumers. In fact, even delivery to end-users is limited, as FERC allows an IPC to engage only "incidentally" in limited end-user delivery services. And when it does do so, FERC Order No. 636 prohibits it from selling that gas; it may only deliver gas owned by others. That is, "FERC's Order No. 636 . . . required all interstate pipelines to 'unbundle' their transportation services from their own natural gas sales." *Tracy,* 519 U.S. at 284 (citing FERC Order 636, 57 Fed. Reg. 13267). In other words, "bundled" service is prohibited; Columbia Transmission may not sell the bundled product of the gas and its delivery. Such bundled sales exist only in the LDC market: residents buy from LDCs to obtain the package deal (along with the regulatory protection outlined above).

Second, the facts here reflect these legal limits. As the Ohio Supreme Court concluded below, any use by Columbia of its various pipeline property for delivery to end-user customers is purely "incidental" and "minimal" relative to the use of that pipeline in Columbia's transmission business. Pet. App. 10a-12a, ¶¶ 26-32. Columbia Transmission has never

used its Ohio-located pipeline property to deliver natural gas to purely residential consumers. The closest that Columbia comes to having residential customers, or arguably quasi-residential customers, are Columbia's "farm tap" customers. Those are agricultural concerns that, like industrial or commercial users, directly "tap into" Columbia's interstate lines, bypassing LDCs for delivery. As the Ohio Supreme Court explained, Columbia's service to these farms seems more a courtesy than a business, for, although Columbia has over 32,000 such customers, it earned "minimal" revenue from them. Pet. App. 11a, ¶¶ 29-30. In fact, Columbia Transmission's publicly filed reports show that it claimed no revenue in tax years 2000 and 2001 from natural gas *distribution*; all of its revenue was attributed to gas *transmission*. *Id.*

Moreover, Columbia Transmission's own experts explained that Columbia could not provide delivery service to residential customers, even if it wanted to. Columbia Transmission's pipelines are not physically configured, without further modifications, to enable such residential delivery services. *Id.* And just as its income reports attribute its revenue to transmission, not distribution, so, too, Columbia Transmission's annual FERC reports and Ohio public utility tax reports classify its property—namely, all of its various pipelines and related transportation equipment—as "transmission property." Essentially, Columbia acknowledges that its property is used for transmission purposes.

Thus, because IPCs such as Columbia Transmission cannot—as a legal or practical matter—enter the LDCs' core market, it is hard to

see how IPCs are now "similarly situated" to LDCs as to the relevant market.

Third, in light of Columbia Transmission's inability to enter the LDCs' core market of residential sales and delivery, the possibility, or even reality, of minor competition in other markets is simply irrelevant. Columbia insists that it and other IPCs may compete in other areas with LDCs—in gas storage, gas gathering, and gas transmission services. This focus on minor areas flies in the face of the Court's focus in *Tracy* on the key residential market, despite the fact that, as the Court plainly explained in *Tracy,* competition did occur in other markets. *Tracy,* 519 U.S. at 302-303. Columbia's way around *Tracy* on this point is circular: Columbia says that the Court should no longer focus on the core market because circumstances have changed; yet, as evidence of the change that purportedly justifies a new approach, it then points to competition in tangential markets, which would only be considered if the Court *first* reconsidered *Tracy's* analysis.

In addition, Columbia's factual assertions about competition in other markets, even if relevant, are not supported by the evidentiary record. As the Ohio Supreme Court concluded, the evidence "does not show that inter-state pipe-line companies are competing with LDC's for the same transportation-service customers." Pet. App. 24a-25a, ¶ 65. Similarly, the court concluded that "there is no evidence here that any interstate-pipeline companies owned or operated natural gas gathering or production facilities in Ohio during the tax years in question." *Id.* at 32a, ¶ 84. Finally, Columbia did

not show, in record evidence, that it directly competes with LDCs in any other market, even on a purely incidental basis.

Fourth and finally, Columbia—unable to show that it could enter the LDCs' core market or that it competes in a relevant way with LDCs in other markets—alternatively tries to shift the focus away from competition issues by stressing the common nature of the property that the various entities own. But this point, even if true, is irrelevant.

Columbia underscores this point in its Question Presented, referring to the fact that it and LDCs use "functionally identical equipment" in their respective businesses. But the Court has never compared businesses based on *what* equipment two entities use, as opposed to *how* they use it. If Columbia's view were true, an unregulated apple-delivery business would be similarly situated to a heavily regulated orange-delivery business, despite selling different products to different consumers, simply because both businesses used trucks and crates to deliver their wares. Cf. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125-26 (1978) (contrasting, in Commerce Clause context, the interstate business of integrated oil companies with local independent gasoline dealers, despite similarity of equipment in both types of businesses).

In sum, Columbia Transmission, as an IPC, is not similarly situated to LDCs. It cannot enter the LDCs' market, it does not compete significantly in other markets, and its use of similar property is irrelevant.

B. The lower courts are not divided on applying *Tracy*.

Columbia barely asserts a division in the lower courts, as it alleges only that the Ohio Supreme Court's decision below conflicts with a Kansas Supreme Court decision. See Pet. at 21-22 (citing and discussing *In re CIG Field Servs. Co.*, 112 P.3d 138 (2005)). But even that minor "conflict" is an illusion, because *CIG* is distinct from the decision below in several ways.

In *CIG*, the court addressed a Kansas property tax scheme that treated intracounty (intrastate) gas-gathering-system property more favorably than interstate and intercounty gathering-system property. CIG Field Services Company ("CIG"), an interstate gathering system, challenged the differential property tax treatment on Commerce Clause discrimination grounds.

To resolve that issue, the court in *CIG* followed this Court's *Tracy* decision, starting with *Tracy*'s "threshold question" about the entities in question. Thus, in *CIG*, the court examined "whether the interstate and intercounty systems are *similarly situated* to intracounty systems." *Id.* at 146 (emphasis added) (citing *Tracy*, 519 U.S. at 299-300). The *CIG* court quoted *Tracy*'s statement that "'in the absence of *actual or prospective competition between supposedly favored and disfavored entities in a single market there can be no local preference.*'" *Id.* at 146.

The CIG court answered the "similarly situated" question by examining the particular facts about the intracounty and intercounty systems at issue, and it concluded that the two were similarly situated.

Nothing about that "different" outcome creates a conflict with the decision below, for the facts regarding the intracounty and intercounty systems were nothing like the facts concerning LDCs and IPCs in Ohio. In particular, the Ohio scenario here involves the different classifications of LDCs and IPCs, not a classification, as in *CIG*, that distinguishes between intrastate and interstate counterparts.

Moreover, the Kansas Supreme Court, applying its standard of appellate review, deferred to its factfinding agency, the Kansas Board of Tax Appeals ("BOTA"), in reaching its conclusion. That is, the court did not itself find that the entities at issue competed; rather, it decided that "substantial competent evidence" existed to support the BOTA's findings regarding competition. *Id.* at 870.

Thus, all that *CIG* demonstrates is that the *Tracy* test, when applied to different facts, can come out different ways. That unsurprising conclusion is the stuff of regular law, not conflict.

C. This case provides no clean opportunity to review the "similarly situated" issue because Columbia's case is fatally flawed on other grounds.

Finally, this case is not a good vehicle to address the threshold issue of whether IPCs are "similarly situated" to LDCs, because even if Columbia Transmission could overcome its threshold problems—and it cannot—it would falter on at least two alternate issues. First, it would fail to show discriminatory taxation, despite the difference in property tax rates of 25 versus 88 percent, because the LDCs, unlike IPCs, must pay a separate "MCF tax." Thus, the IPCs' higher property tax rate is a "compensatory tax," imposed to bring the IPCs' total burden into rough equity with LDCs' burden. Second, Congress has expressly insulated Ohio's scheme here from dormant Commerce Clause challenge.

1. The challenged property tax statute is a constitutionally valid "compensatory tax" because it imposes on IPCs a burden "similar to" or "in lieu of" the tax burden that LDCs bear.

Under the "compensatory tax" doctrine, the Court has held that, even if a challenged tax statute operates to discriminate against interstate commerce, the tax nonetheless may constitute a constitutionally valid "compensatory" or "complementary" tax. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 n.2 (1996). As the Court explained in *Fulton*:

> We use the terms "compensatory" tax and "complementary" tax as two ways of describing the same phenomenon: a tax on interstate commerce "complements" a tax on intrastate commerce to the extent that it "compensates" for the burden imposed on intrastate commerce *by imposing a similar burden on interstate commerce.* We have also described taxes on interstate commerce as being imposed *"in lieu" of taxes on intrastate commerce.*

Id. (emphasis added); see also *Tracy*, 519 U.S. at 308-09.

Here, the higher property tax rate that IPCs must pay is merely a compensatory tax, because it substitutes for a *different* tax that LDCs, but not IPCs, must pay: the MCF tax. "MCF" stands for "thousands of cubic feet," and the MCF tax is charged to LDCs based on the volume of gas that the LDCs sell and deliver. Ohio Rev. Code § 5727.811. Ohio's General Assembly plainly intended for the LDCs' reduced property tax rate to offset the burden of the MCF tax, as both steps occurred in the same legislation. See Am. S. B. 287 of the 123rd General Assembly, effective Dec. 21, 2000, 148 Ohio Laws 1156, 11550 (enacting the reduction in the assessment rate on LDC personal property), 11560 (enacting the MCF tax imposed against LDCs). That is, LDCs once were subject to the same 88 percent property tax rate that IPCs face. Then, Ohio's General Assembly simultaneously imposed the new MCF tax on LDCs and lowered their property tax rate from 88 percent to 25 percent. Legislative

materials describe this combination as revenue-neutral from the State's collections perspective.[3] Of course, if the State expected to receive the same amount, it necessarily follows that the taxpayers were expected to pay the same, in aggregate.

Thus, Ohio's higher tax rate on IPCs is a compensatory tax under *Fulton* because it imposes a "similar burden" to the one that the MCF imposes on LDCs. Notably, the Court has applied two different standards for assessing possible compensatory taxes, and here, *Fulton*'s "similar burden" standard applies. That standard applies when a challenger alleges that a particular tax discriminates in practical effect, but not on its face. Here, Columbia raises only a challenge to the Ohio tax law's effect; it does not assert (nor could it) that the Ohio law facially discriminates against interstate commerce. Thus, the similar burden test applies, and for the reasons above, the challenged tax here is valid as a compensatory tax relative to the MCF tax.

By contrast, the Court uses a heightened standard to assess purported compensatory taxes in facial discrimination cases, but that standard does not apply here. When a challenged law allegedly discriminates on its face, the Court finds a tax compensatory only when it is "substantially

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[3] In the Ohio Tax Commissioner's Annual Reports for the 2002 tax year and for each year thereafter, the Tax Commissioner describes the MCF tax as having "replaced the revenue local governments lost when the assessment rate for natural gas distribution companies' [LDCs'] personal property was reduced from 88% to 25%." See 2002 Annual Report, Appendix to Commissioner Levin's Appellant's Brief, filed in Ohio Supreme Court, at 70.

equivalent" to the tax on intrastate commerce. *Fulton*, 516 U.S. at 332-333 (quoting *Armco, Inc. v. Hardesty*, 467 U.S. 638, 643 (1984)). But Ohio need not meet that test, as again, Columbia does not raise a facial discrimination claim.

In sum, under the "compensatory tax" doctrine, Ohio's tax scheme is constitutional, so even if Columbia could somehow succeed on its threshold issue, it ultimately cannot win this case. That, in turn, makes this a poor vehicle to review the threshold issue. If the Court ever finds a need to review the "similarly situated" test outlined in *Tracy*, it should do so in a case in which the resulting discrimination, and thus the ultimate result, at least *might* favor the party challenging a law. Here, by contrast, the facts regarding the MCF tax are strong enough to make Columbia's ultimate failure a foregone conclusion, and that is reason enough to deny review.

2. Federal law expressly exempts preferential State tax treatment of LDCs from dormant Commerce Clause challenge.

Yet another independent issue dooms Columbia's case. The negative Commerce Clause operates to restrict State action when Congress is silent. But when Congress expressly blesses State action, no such dormant Commerce Clause claim can succeed. That is the case here because Congress, in Section 1(b) of the Natural Gas Act of 1938, 15 U.S.C. 717(b), provides an "express Commerce Clause exemption for state regulation of retail natural gas sales." *Tracy*, 519 U.S. at 305; see also *id.* at 291 (Section 1(b) of the NGA "explicitly

exempted 'local distribution of natural gas' from federal regulation.").

To be sure, the Court in *Tracy* did not rely on the NGA's Commerce Clause exemption as an independent basis for sustaining the constitutionality of Ohio's sales and use tax classifications. But the Court's explanation, even if dicta, strongly suggests that the issue is not a close one, as the States' side is clear-cut:

> In the present case, the parties have not briefed the question whether the present amended version of the NGA and related federal legislation continues the express Commerce Clause exemption for state regulation and taxation of retail natural gas sales recognized in [*Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U.S. 507 (1947)], and we do not decide this issue. We note, however, that the language of § 1(b) of the NGA, which the *Panhandle-Indiana* Court construed as creating the exemption, itself remains unchanged. (Compare 52 Stat. 821 with 15 U.S.C. § 717(b) (1994).)

Tracy, 519 U.S. at 305 n. 13; see also *id.* at 292-93 (citing *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946) (upholding discriminatory state taxation of out-of-state insurance companies as authorized by the McCarran Act)).

The *Tracy* Court's comments about the NGA's Section 1(b) apply today, as the same language that

remained unchanged at that time is still in the statute. Compare 52 Stat. 821 with 15 U.S.C. § 717(b) (2008).

Similarly, Congress surely is aware that the fundamental role played by LDCs in the natural gas industry remains unchanged from this Court's decision in *Tracy*. Although Ohio and other States may allow independent marketers to sell to consumers, the LDCs retain a unique role as the sole method of delivery to houses, and both the facts and the legal regimes reflect that. As natural monopolies, LDCs alone have the physical infrastructure of distribution pipeline to deliver natural gas to residential and small-business consumers. Thus, only the LDCs have the duty and ability to provide vital "bundled" natural gas to the general public as "providers of last resort" on the coldest days of the year.

If Congress sees the playing field as now "tilted" unfairly, as Columbia Gas argues, then Congress can step in to change the rules of the game. Unless it does, this Court has no need to change its course from *Tracy*.

In sum, Columbia Transmission's petition should be denied.

CONCLUSION

The petition should be denied.

Respectfully submitted,

NANCY H. ROGERS
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
STEPHEN P. CARNEY
Deputy Solicitor
BARTON HUBBARD
Assistant Attorney General
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Respondent
Richard A. Levin, Tax
Commissioner of Ohio

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No. 07-1554

IN THE

Supreme Court of the United States

COLUMBIA GAS TRANSMISSION CORPORATION,

Petitioner,

v.

RICHARD A. LEVIN
TAX COMMISSIONER OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CARRIE J. HIGHTMAN
STEPHEN R. MELTON
KENNETH W. CHRISTMAN
NiSource Corporate Services Co.
801 E. 86th Avenue
Merrillville, IN 46410
(219) 647-6047

DOUGLAS R. COLE*
** Counsel of Record*
MARYANN B. GALL
PHYLLIS J. SHAMBAUGH
JONES DAY
P.O. Box 165017
Columbus, OH 43216-5017
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTRODUCTION

Despite State's assertions, this case does not involve "the application of settled law to a particular set of facts." Opp. at 1. Rather, the Ohio Supreme Court decision, while purporting to comply with *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), directly conflicts with both its language and its logic. Moreover, the Ohio court's understanding of *Tracy* cannot be squared with the Kansas Supreme Court's understanding of that decision as reflected in *In re CIG Field Services Co.*, 279 Kan. 857 (2005). The confusion engendered by the decision below matters greatly, as the Ohio Supreme Court's flawed Commerce Clause analysis threatens to frustrate Congress's stated intent of creating a "competitive, national market" for natural gas.

The Commerce Clause prevents States from putting a thumb on the competitive scales in favor of local competitors. The State cannot deny that the tax scheme here does just that—Ohio's personal property tax scheme taxes pipeline equipment owned by interstate pipeline companies at nearly four times the rate that applies to identical equipment owned by local distribution companies (LDCs). This tax differential systematically disadvantages interstate pipeline companies in the various markets in which they directly compete against LDCs. The Ohio Supreme Court upheld this tax scheme only because that court read *Tracy* as essentially creating a per se rule under which States have a blank check to discriminate in favor of LDCs.

Correctly understood, however, *Tracy* says no such thing. Rather, *Tracy* created a narrow exception to traditional Commerce Clause nondiscrimination

principles, under which Ohio was allowed to treat LDCs differently because, at the time that *Tracy* was decided, in addition to competing in the market at issue there, the LDCs also served as sole suppliers in a captive, noncompetitive residential market in Ohio. As the State admits, the captive, noncompetitive residential market for natural gas no longer exists in Ohio. LDCs compete with gas suppliers in the residential market, just as they compete with interstate pipelines companies for the various transportation services outlined in the petition.

Thus, the question this case presents is whether the natural gas industry will forever be exempt from normal Commerce Clause principles, such that States will forever be allowed to discriminate in favor of local distribution companies and against the LDCs' interstate competitors, even when the market conditions that originally legitimized that discrimination no longer exist. *Tracy* suggests no reason why that should be the case, nor does *In re CIG* understand *Tracy* that way. The court below, however, clearly did. Only this Court can resolve that conflict, a conflict that threatens to imperil efforts to achieve the "integrated and efficient pipeline grid" that Congress and FERC have determined is vital to serving our nation's energy needs.

1. The State's attempt to resolve the conflict between the decision below and *Tracy* falls flat. The State claims that *Tracy*'s willingness to depart from traditional Commerce Clause nondiscrimination principles did not rest on concerns about the LDCs' unique role as sole supplier to the noncompetitive, captive residential market, but rather that the existence of this captive, noncompetitive market was

merely one of "several factors" underlying *Tracy*. Opp. at 5–8. The very portions of *Tracy* that the State cites, however, show the flaw in this argument.

a. Each of the three *Tracy* passages on which the State relies expressly refers to the importance of avoiding harm to the "noncompetitive, captive market." Opp. at 6, 7. Indeed, as the brief in opposition notes, the Court saw its task in *Tracy* as deciding whether to "'accord controlling significance to the noncaptive market in which [LDCs] compete, or to the noncompetitive, captive market in which the local utilities alone operate.'" Opp. at 6, quoting *Tracy*, 519 U.S. at 303. That dichotomy—between (1) a "noncaptive market in which LDCs compete" and (2) a "noncompetitive, captive market in which the [LDCs] alone operate"—no longer exists in Ohio. See Opp. at 11 (acknowledging that "Ohio now allows independent natural gas marketers to compete with LDCs in the retail sale of natural gas to residential and business customers").

Thus, the State is simply wrong (as was the court below) to rely on *Tracy*'s concerns about "'proceed[ing] cautiously lest we imperil the delivery by regulated LDCs of bundled gas to the noncompetitive captive market,'" see Opp. at 6–7, quoting *Tracy*, 519 U.S. at 304, as justification for the discrimination here. No such market exists.

b. The State fares no better in resting its argument on the Court's observation in *Tracy* that Congress is better suited to the task of "'strik[ing] the balance between the needs of the competitive and captive markets.'" Opp. at 7, quoting *Tracy*, 519 U.S. at 304. It is particularly befuddling that the State insists that *Tracy*'s reference to Congress's

comparative advantage in balancing needs between competitive and captive markets "is not affected by the presence of competition" in the formerly captive markets. Opp. at 7. Of course it is—when there is no captive market, there is no need to strike a balance between competitive and captive markets. LDCs now compete with independent gas marketers to supply gas in the residential market in Ohio, just as they compete with interstate pipeline companies in the various markets the petition identified. Thus, viewing *Tracy* as a case about Congress's comparative institutional advantage in balancing between competitive and captive markets does not even address, let alone resolve, the conflict that exists between *Tracy* and the decision below.

Moreover, even if *Tracy* stresses the importance of close attention to congressional policy choices in this area, such attention favors Columbia Transmission. For it is the State, not Columbia Transmission, that seeks to contravene Congress's choices. Congress has repeatedly determined, most recently in the Energy Policy Act of 2005, that the national interest is best served by a competitive, nationwide gas market and by increased investment in gas infrastructure. See Pet. at 23–29. A Commerce Clause jurisprudence, like the one adopted below here, that permits States unfettered discretion to discriminate in favor of local utilities at the expense of their interstate competitors, directly impedes the achievement of those national goals.

2. The State similarly fails in its attempt to resolve the conflict with *Tracy* by asserting that the LDCs are subject to unique regulatory obligations and thus are not "similarly situated." See Opp. at 8–

10. Indeed, its argument fails both on the law and the facts. As to the former, *Tracy* did not point to alleged regulatory differences as the basis for its holding that LDCs were not similarly situated to independent marketers. Rather, the Court's holding cited the fact that the former participated in a "noncompetitive, captive market," while the latter did not, as the basis for distinction. As noted above, that difference no longer exists in Ohio. Nor did the Ohio Supreme Court's decision rest on alleged regulatory differences. While it may have noted in passing that such differences exist, its decision on substantial similarity turned solely on the fact that interstate pipeline companies do not compete in the residential market.

To be sure, the Court could *change* Commerce Clause jurisprudence in this area to instead focus on the regulatory framework as the basis for the "similarly situated" analysis, but the State is wrong to suggest that either *Tracy* or the decision below somehow both reflect that analysis. Indeed, the uncertain role that alleged regulatory differences play merely serves to highlight the confusion that requires the Court's attention.

In any event, on the facts here, the alleged regulatory differences fail to reconcile the conflict. As Columbia Transmission explained in its briefing below, while it is not subject to the Ohio regulations that the State cited, it is subject to various similar federal regulatory burdens. Columbia Trans. Ohio Sup. Ct. Br. at 3. Thus, regulatory differences alone, even if they could suffice to show that two entities are not similarly situated under *Tracy*, do not do so here. In sum, the decision below creates substantial

confusion as to what *Tracy* means, confusion that only this Court can resolve.

3. The State's next argument—that independent marketers and LDCs are not similarly situated for Commerce Clause purposes—misses the point. See Opp. at 10–13. Columbia Transmission is not asserting that *independent marketers* are similarly situated to LDCs (after all, as the State notes, see Opp. at 12, Columbia Transmission is not an independent marketer, but an interstate pipeline company). Rather, Columbia Transmission's argument is (1) that *interstate pipeline companies* and LDCs are similarly situated in that they directly compete in various markets; (2) that interstate pipeline companies are systematically disadvantaged in that competition by Ohio's discriminatory tax scheme; and (3) that Ohio can no longer point to the existence of a separate "noncompetitive, captive market," see *Tracy*, as a basis to justify that discrimination. Thus, the point is not that independent marketers are *similarly situated* to LDCs (although they likely are), but rather that the independent marketers are *directly competing* with LDCs in the residential market, meaning that market is no longer a "noncompetitive, captive market" as it was when *Tracy* was decided. And, with regard to *that* point, the State concedes that Columbia Transmission is correct. See Opp. at 11.

4. The State's argument that competition in the various markets that Columbia Transmission identified does not matter, because this competition does not occur in the LDCs' "core market," see Opp. at 13–17, is circular. To be sure, *Tracy* held that when LDCs compete in one market, but are also sole

suppliers of gas to a "noncompetitive, captive market," the existence of the latter market insulates them from being "similarly situated" with competitors in the former market for Commerce Clause purposes. But, as Columbia Transmission explained (both in the Petition and above), that holding turned on *the existence of a noncompetitive, captive market that no longer exists.* That is, *Tracy* did not identify the residential market as having special significance because the market was *residential*, but rather because that market was a *noncompetitive, captive* market. Thus, the State's claim that the residential market is "core," and that other markets are "marginal," for purposes of the Commerce Clause analysis reflects the same misplaced view of *Tracy* adopted by the court below. Merely reiterating that view, as the State does here, neither justifies it, nor does it overcome the need for certiorari to correct that flawed view before it spreads more widely, thereby interfering with the Congress's desire to build a "competitive, national market."

The State similarly fails in its efforts to advance its case by mischaracterizing Columbia Transmission's argument. Contrary to the State's suggestion, Columbia Transmission does not contend that LDCs and interstate pipeline companies are "similarly situated" merely because they happen to use "functionally identical equipment." Opp. at 17. Rather, the gist of Columbia Transmission's argument is that these two groups are similarly situated in that they use functionally identical equipment *to directly compete with one another.* Thus, contrary to the State's claim, Columbia Transmission does not contend that an "unregulated apple-delivery business" is similarly situated to a

"heavily-regulated orange-delivery business" merely because they both use delivery trucks. Opp. at 17. Rather, Columbia Transmission's claim is that if an in-state and an interstate apple-delivery business both use trucks to compete with one another in delivering fruit in the State, the State could not elect to tax the interstate carrier at a higher rate than the in-state competitor. See *Am. Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987) (invalidating tax that discriminatorily impacted interstate truckers). In other words, the issue here is not apples to oranges, but "local apples" to "interstate apples." See *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977) (striking on Commerce Clause grounds a North Carolina statute that discriminated against Washington apples).

5. The State similarly fails to resolve the conflict between the decision below and the Kansas Supreme Court's decision in *In re CIG Field Services, Co.*, 279 Kan. 857 (2005). As the State acknowledges, the Kansas court found that the similarly-situated inquiry turned on whether there was "competition between the supposedly favored and disfavored entities in a single market." Opp. at 18, quoting *CIG*, 112 P.3d at 146, in turn quoting *Tracy*, 519 U.S. at 300. Applying that test here, of course, would result in a finding that LDCs and interstate pipeline companies *are* similarly situated, for no one meaningfully disputes that these two groups compete in some markets. Thus, the tests announced by the Kansas and Ohio courts are fundamentally incompatible.

The State, however, claims that there is no conflict because the Kansas case involved "intracounty and

intercounty systems," while the case below involved "intrastate and interstate counterparts." Opp. at 19. That is a distinction without a difference. Indeed, if anything, the discrimination here is more egregious from a Commerce Clause perspective. The categories in *In re CIG*, while clearly having a differential *impact* on interstate commerce (all single county businesses are necessarily in-state, while intercounty businesses may or may not be located in a single state), did not directly correspond to the in-state/interstate distinction in the way that the categories at issue here (local distribution company vs. interstate pipeline company) do.

Nor does the State's reference to *In re CIG*'s reliance on agency fact findings cure the split. Opp. at 19. To be sure, the Kansas court pointed to the agency's finding of "substantial, competent evidence" that competition existed in various markets. But the State here is not meaningfully disputing (nor did the court below) that LDCs and interstate pipeline companies compete in at least some markets. See Opp. at 16 (admitting "the possibility, or even reality, of minor competition in other markets"); Pet. App. at 25a (not denying evidence of competition, but rather claiming that "the existence of other areas of actual or potential competition" does not matter under *Tracy*).

In short, factual disputes do not distinguish this case from *In re CIG*. Rather, the dispute is whether the Ohio court is correct that *Tracy* has forever imbued the residential market with special significance in Commerce Clause jurisprudence, even if that market is no longer a "noncompetitive, captive market."

6. The compensatory tax issue the State raises is a red herring. See Opp. at 20. The MCF tax to which the State refers applies to gas delivered through meters to end users. See OHIO REV. CODE ANN. § 5727.811 (West 2007) (tax applies to "natural gas distributed by the company through a meter of an end user in this state"). The tax is thus not the same type of tax (i.e., a personal property tax) as the tax at issue here. Moreover, as a transactional tax on deliveries to end users, it does not apply to gas that an LDC transports to another LDC, or that an LDC transports to gas storage sites, nor does it apply to gas that travels though an LDC's pipes in gathering operations. That is, the tax does not apply to many of the areas in which LDCs directly compete with interstate pipeline companies. A different type of tax on a different component of the business—deliveries to end users—cannot serve as a compensating tax for services provided in the nonresidential markets. See *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 105 (1994) (discriminatory tax on utilizing Oregon landfills could not be justified by difference in income tax, as they were "entirely different kinds of taxes").

7. The State's claim that the Natural Gas Act (NGA) somehow reflects congressional approval of the state discrimination here also fails. See Opp. at 23–25. To start, the State never briefed or argued that issue below. But, more importantly, the State is wrong that the NGA insulates the States from Commerce Clause scrutiny with regard to the tax here. The purpose of the NGA is to establish the dividing line between state and federal regulatory authority over natural gas transmission and distribution. The NGA authorizes the federal

government to regulate *interstate* natural gas activities and assigns primary regulatory responsibility to the States for *local* distribution. Thus, the discriminatory tax at issue in *Tracy*, a sales tax on the local sale of natural gas to end users, fell squarely within the activities that the NGA had assigned to State oversight. The tax at issue here, however, which applies, *inter alia*, to interstate pipelines that traverse Ohio, does not fall within the realm of exclusive State authority. And, nothing in the NGA suggests that Congress intended interstate transmission pipelines to be subject to discriminatory State taxation. In short, whether the Court's fleeting dicta on the unbriefed NGA issue in *Tracy* is ultimately correct or not, that dicta offers no guidance on the very different question here, and presents no reason for the Court not to take this case.

As more fully explained in the Petition, see Pet. at 23–29, Congress has consistently recognized the importance of encouraging natural gas infrastructure development. Confusion regarding the limits on the States' ability to discriminatorily tax that natural gas infrastructure creates strong disincentives to investment. This case presents an ideal vehicle for the Court to remedy that confusion. Accordingly, Columbia Transmission urges the Court to grant certiorari.

CONCLUSION

For the reasons stated in the Petition and above, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

CARRIE J. HIGHTMAN
STEPHEN R. MELTON
KENNETH W. CHRISTMAN
NiSource Corporate Services Co.
801 E. 86th Avenue
Merrillville, IN 46410
(219) 647-6047

DOUGLAS R. COLE*
** Counsel of Record*
MARYANN B. GALL
PHYLLIS J. SHAMBAUGH
JONES DAY
P.O. Box 165017
Columbus, OH 43216-5017
Telephone: (614) 469-3939
Facsimile: (614) 461-4198

Counsel for Petitioner

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On Petition for a Writ of Certiorari to the Ohio Supreme Court

BRIEF *AMICI CURIAE* OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA AND THE COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

TODD A. LARD
DOUGLAS L. LINDHOLM
JANA L. MALONE
BOBBY L. BURGNER
J. HUGH MCKINNON
KEITH G. LANDRY
COUNCIL ON STATE TAXATION
122 C St. N.W.
Suite 330
Washington, D.C. 20001
(202) 484-5222

DONALD F. SANTA
JOAN DRESKIN
TIMM ABENDROTH *
DAN REGAN
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA
10 G Street, N.E.
Suite 700
Washington, DC 20002
(202) 216-5912

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether an Ohio tax that levies a rate more than three times higher on interstate natural gas pipeline property than on property that belongs to local natural gas distribution companies violates the Commerce Clause bar against discriminatory taxes, and undermines federal natural gas policy, where the interstate and local companies offer directly competing services in some (but not all) of the markets in which they operate.

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BRIEF *AMICI CURIAE* OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA AND THE COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE* [1]

The Interstate Natural Gas Association of America ("INGAA") and the Council On State Taxation ("COST") submit this brief *amici curiae* in support of the petition pursuant to the Court's Rule 37. Petitioner and Respondent consent to the filing.

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than INGAA made a monetary contribution to the preparation or submission of this brief.

INGAA is a trade organization that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in North America. INGAA represents virtually all of the interstate pipelines and interstate natural gas storage companies operating in the United States, including Petitioner. Its members transport over 95 percent of the nation's natural gas through a network of over 200,000 miles of pipelines. INGAA pipelines are subject to regulation by the Federal Energy Regulatory Commission ("FERC") under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717w.

Consistent with Congressional objectives in several major deregulatory initiatives, a competitive nationwide market for natural gas has evolved, permitting customers to purchase gas at the wellhead, and have it transported and stored on interstate pipelines and intrastate local distribution companies ("LDCs"). Within that newly competitive "wellhead-to-burnertip" market, INGAA's members often compete among themselves and with LDCs to transport and store natural gas. State taxing authorities often find interstate pipelines, with their substantial pipeline infrastructure assets literally sunk in state soil, attractive targets for discriminatory taxes. The additional tax burden handicaps interstate pipelines' ability to compete with the LDCs in transporting gas to customers.

Several INGAA members have a direct interest in the outcome of this case. Like petitioner, they provide interstate pipeline service into and through Ohio that competes with the tax-favored LDCs' comparable

natural gas transportation and storage services, and are competitively disadvantaged as a result.[2]

In addition, all INGAA members have an interest in the outcome of this case. The decision below misreads this Court's dormant Commerce Clause precedent in *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997), to create what amounts to a safe harbor for states to discriminate against interstate pipelines in favor of their LDCs. The simple fact is that the regulatory landscape for gas delivery is significantly different than it was in 1997. The court below misapplied *General Motors* when it failed to give appropriate effect to competitive changes in both federal and Ohio regulation — changes that make it unnecessary to continue according special deference to Ohio LDCs. Allowing the decision below to stand will reinforce discriminatory state taxes already in place (*see* Appendix), encourage other states to follow suit, and may discourage potential natural gas transportation competition from interstate pipelines in end use markets for both large and small customers. INGAA thus has a substantial interest in how the Commerce Clause is applied to discriminatory state tax regimes, particularly where, as in this Ohio case, the tax-favored local companies compete with INGAA's interstate pipeline members.

COST is a non-profit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of multi-jurisdictional busi-

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[2] The other interstate pipelines that are (or will be) directly affected by Ohio's discriminatory property tax are ANR Pipeline Company, Dominion Transmission, Inc., Panhandle Eastern Pipeline Company, Rockies Express Pipeline, LLC, Tennessee Gas Pipeline Company, Texas Eastern Pipeline Company, Texas Gas Transmission, LLC, and Trunkline Gas Company, LLC.

ness entities. COST represents more than 600 of the largest multistate businesses in the United States, companies from every industry doing business in every state.

Many of COST's members are engaged in business in the State of Ohio and thus have a particular interest in the ultimate disposition of the tax scheme at issue in this case. In addition, the entire membership of COST has a vital interest in ensuring that states do not impede, through discriminatory property taxes, the rights of all businesses to engage in commerce in the national market. The Ohio tax scheme at issue in this case, like similar schemes currently in place in other states, impedes sellers' access to the national market by imposing higher property taxes on out-of-state sellers. That is precisely the sort of parochial favoritism that COST opposes, and that the Commerce Clause forbids.

INTRODUCTION AND SUMMARY OF ARGUMENT

Ohio's personal property tax regime assesses natural gas pipeline property at 88 percent of its value if it is owned by an interstate pipeline company and 25 percent if it owned by an LDC. In upholding this disparity against Petitioner's Commerce Clause argument, the Ohio Supreme Court relied upon *General Motors, supra,* where this Court held that an Ohio sales tax that assessed higher rates for sales by interstate natural gas marketers than for sales by LDCs did not run afoul of the Commerce Clause because the LDCs and the marketers were not "similarly situated." App. 19a-30a. In *General Motors*, the Court acknowledged that there were markets in which the LDCs and marketers competed (e.g., retail sales to large industrial customers) and a market in

which they did not (i.e., a captive market where LDCs provided bundled retail sales and delivery services to residential and small commercial customers). 519 U.S. at 303. Given a long history of Congressional deference to the States' regulation of bundled retail sales and distribution, the Court decided to give greater weight to the captive LDC market, and accordingly treated the marketers and LDCs as "dissimilar" for Commerce Clause purposes. *Id.* at 303-04.

Policies promoting competition at the federal level and in Ohio have altered the foundation underlying *General Motors* and its applicability to this case. *General Motors* was premised on a federal regulatory scheme that left intact the state model of vertically integrated, monopolistic LDCs. Since 1997, federal policies have promoted full participation of LDCs in the deregulated market for interstate transportation of natural gas. More importantly, the pivotal consideration behind *General Motors* — deference to traditional State protection of their LDC markets — is no longer operative. Ohio, like many other states, has since adopted a "retail choice" program under which its LDCs no longer act as sole suppliers of bundled sales and distribution to a captive customer base. *See* Pet. at 6-9. Indeed, "Ohio has the second largest program with about 48 % of all eligible households participating and enrollment levels of nearly 1.4 million." Energy Information Administration, Dep't of Energy, *What Are Natural Gas Customer Choice Programs?* at 1-2 (June 2008), available at http://tonto.eia.doe.gov/energy_in_brief/natural_gas_customer_choice.cfm (hereinafter "EIA-*Customer Choice Programs*"). As a result, there is substantial head-to-head competition, sanctioned by Ohio legislation, between LDCs and natural gas marketers for the formerly protected LDC market for

bundled gas sales and transportation, including for small volume customers.

The court below erred in grounding its decision on the fact the interstate pipelines do not themselves compete in the LDCs' residential and small customer market. The source of the competition is not pertinent to the *General Motors* reasoning. The important point is that the LDCs' residential/small customer market no longer enjoys Ohio-sanctioned protection from competition. In these circumstances, there is no longer a reason for this Court to stay its hand in applying traditional Commerce Clause relief to eliminate discrimination, particularly where the interstate pipelines and LDCs compete in the markets for storage service and transportation to large customers.

Review in this case is important because Ohio's misapplication of *General Motors* creates a safe harbor that invites and perpetuates state tax discrimination against interstate natural gas pipelines. There is an inherent danger of similar discriminatory taxation, given the nature of the natural gas pipeline industry. Large investments in interstate pipeline projects cannot feasibly be undone; they are literally sunk, and easy targets for discriminatory state taxes.

ARGUMENT

OHIO'S PROPERTY TAX VIOLATES THE COMMERCE CLAUSE BAR AGAINST DISCRIMINATORY TAXES AND UNDERMINES FEDERAL NATURAL GAS POLICY

A. The Court Below Misapplied *General Motors v. Tracy*.

The dormant Commerce Clause "prohibits economic protectionism — that is, 'regulatory measures designed to benefit in-state economic interests by

burdening out-of-state competitors.'" *Department of Rev. of Kentucky v. Davis*, 128 S.Ct. 1801, 1808 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-274 (1988) (internal quotes)). Application of the dormant Commerce Clause carries out the Framers' purpose to "preven[t] a State from . . . jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330-31 (1996) (quoting *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995)).

Much of the Court's Commerce Clause jurisprudence is directed at state taxation, and "the Court has scrutinized claims that a tax discriminates against interstate commerce with considerable vigilance." Jerome R. Hellerstein & Walter Hellerstein, 2 *State Taxation*, ¶4.13 (2000). *See, e.g., South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999); *Fulton, supra*, 516 U.S. 325 (1996); *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388 (1984); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318 (1977).

It is undisputed that Ohio imposes a discriminatory tax, assessing LDC pipeline property at 25 percent of value, and interstate pipelines at 88 percent. Pet. App. 2a.[3] Under traditional Commerce

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[3] The tax is imposed on "public utility" property. In 2000, Ohio reduced the assessment rate on a category of public utilities ("natural gas companies") from 88 to 25 percent. Pet. App. 1a-2a. In the decision below, the court rejected Petitioner's argument that its interstate pipeline meets Ohio's definition of

Clause jurisprudence, "if a restriction on commerce is discriminatory, it is virtually *per se* invalid." *Davis*, 128 S.Ct. at 1808 (citing *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)); *accord*, *United Haulers v. Oneida-Herkimer Solid Waste Mgmt.*, 127 S.Ct. 1786 (2007). In order to make out a case of discrimination, there is a threshold showing that the disfavored interstate entity and the favored in-state entity are "similarly situated" in the competitive market, i.e., that they are in competition. *General Motors*, 519 U.S. at 298-300. Absent such a showing, the dormant Commerce Clause objective of preserving a competitive national market could not be vindicated. *Id.* at 299-300.

In *General Motors*, the Court rejected a Commerce Clause attack on an Ohio sales tax that discriminated against interstate natural gas marketers in favor of Ohio LDCs. While the Court acknowledged that the interstate marketers and LDCs competed in certain markets (e.g. for large industrial customers), it was undisputed that the marketers were not in competition to serve the LDCs' captive market for bundled sales and local distribution service to residential and small retail customers. *Id.* at 302-03. The Court acknowledged that where entities compete in some markets but not others "there is no *a priori* answer" to whether the two entities should be treated alike for dormant Commerce Clause purposes, and that "a choice is possible[.]" *Id.* at 304; *see also id.* at 307 (referring to the "choice" before the Court). After reviewing the prevailing regulatory context, the Court

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a "natural gas company." *Id.* at 5a-15a. The result is that Petitioner's and other interstate pipelines' property is assessed at 88 percent while LDCs are eligible for the reduced 25 percent rate applicable to "natural gas companies."

deferred to "[t]he continuing importance of the States' interest in protecting the captive market from the effects of competition for the largest consumers[,]" *id.* at 306, and concluded that the marketers and LDCs "should not be considered 'similarly situated' for purposes of a claim of facial discrimination under the Commerce Clause." *Id.* at 310. "First and most important" to the Court's decision was its concern that an order barring the tax discrimination in favor of LDCs would "imperil the delivery by regulated LDCs of bundled gas to the noncompetitive market." *Id.* at 304.

In rejecting Petitioner's Commerce Clause argument, the court below misapplied *General Motors*. Petitioner pointed out that since *General Motors* was decided, Ohio has implemented "retail choice" legislation that required LDCs to unbundle their gas sales, transportation/distribution, and storage services, thus affording their customers the freedom to purchase gas on the open market with the LDC serving as a common carrier. *See* Pet. at 6-8; *see also* EIA-*Customer Choice Programs*, *supra*, page 5. While acknowledging that the LDCs thus now face competition in the formerly captive residential and small business market, the court held it dispositive under *General Motors* that the interstate pipelines did not themselves compete in those markets:

> [*General Motors*] determined that LDCs and independent marketers were not "similarly situated" for dormant Commerce Clause purposes because they did not compete in the LDCs' core residential market, and eliminating any tax differential between the LDCs and marketers would not alter the competitive nature of this market. Gen. Motors Corp., 519 U.S. at 297-303,

> 117 S.Ct. 811, 136 L.Ed.2d 761. Columbia has not shown in this case that it competes with LDCs in the residential market or that it would compete in this market should we rule in its favor.

Pet. App. 28a; *see also id.* at 29a ("In conclusion, Columbia's failure to show that it is in direct competition with Ohio's LDCs in the residential market proves fatal to its dormant Commerce Clause claim.").

This is a misreading and misapplication of the *General Motors* decision. The important point of the change in state regulation that opened up LDCs in Ohio to competition in their formerly captive markets is *not* that interstate pipelines do not compete in that market sector, but that *Ohio no longer deems it necessary to preserve the traditional protected monopoly operations of its LDCs from competition in general.* To be sure, as Petitioner acknowledges (Pet. 3), LDCs' "natural monopoly" in municipal distribution will almost always forclose interstate pipelines from competing for natural gas transportation service to the LDCs' residential customer base, but others (gas marketers affiliated with other LDCs and independent marketers) can and do compete with LDCs for commodity sales in this market, using the LDCs' unbundled distribution service to deliver the gas. Pet. App. 27a. More importantly, interstate pipelines continue to compete with the LDCs to serve the other markets — transportation to large industrial and electric power end users, storage customers, and customers of natural gas gathering and production services. Pet. App. 25a.

Given *General Motors'* observation that there is no *a priori* answer to the proper application of the dor-

mant Commerce Clause in a mixed market situation (*General Motors*, 519 U.S. at 304), i.e., where the LDC operates in monopolistic and competitive markets at the same time (*see id.* at 314 (Stevens, J., dissenting)), the fact that LDCs in Ohio no longer have that monopolistic market undermines reliance on the *General Motors* reasoning here. The ground for the Court's "choice" in *General Motors* — the concern that a Commerce Clause-based discrimination remedy would imperil Ohio's protection of its LDCs residential consumers — has been eliminated. If the Ohio legislature is prepared to expose its LDCs to the market, there is no reason for special protection from the courts.

B. Evolution of Federal and State Regulatory Policy Since *General Motors* Eliminates the Rationale for Deference to Ohio LDCs in Remedying Discrimination that Violates the Commerce Clause.

The Court is already familiar with the evolution of the natural gas industry up to 1997, from the original clean line between separately regulated state and federal spheres created under the NGA in 1938, to the more recent Congressional legislation and FERC initiatives designed to create a competitive nationwide market for natural gas and its transportation. As more fully set out in *General Motors*, 519 U.S. at 283-85, 288-97, the federal program has transformed the industry by deregulating wholesale prices, and promoting a competitive market for transportation of gas by both interstate and intrastate pipelines.

In *General Motors*, the Court recounted these developments, and observed that "the question raised by this case is whether the opportunities for competi-

tion between marketers and LDCs in the noncaptive market requires treating marketers and utilities as alike for dormant Commerce Clause purposes." 519 U.S. at 303. As discussed above, the Court ultimately declined to offer a Commerce Clause remedy for the discriminatory tax out of deference to the traditional State protection of LDCs' captive residential customer base.

Petitioner has shown how the decision below permits continued discrimination against it and other interstate pipelines, contrary to the Congressional purposes underlying federal decontrol legislation and FERC's implementation of it. Pet. 23-29. Another facet of this federal program pertinent here is FERC's approach to bypass cases, where customers served by LDCs seek a direct connection to an interstate pipeline. At one time, FERC had a policy preference that led it to disallow such connections, principally out of the same concern that led this Court to defer to the LDCs in *General Motors* — a concern that the bypass would raise the cost of service for the LDCs' remaining customers. *See, e.g., Northern Natural Gas Co.*, 48 FERC ¶ 61,232 at pp. 61,827-29 (1989) (explaining policy evolution). FERC abandoned the policy preference in the 1980s in favor of the Congressional policy to advance nationwide competition in the industry by permitting consumers to obtain direct access to gas supplies even if that meant bypassing the LDC to connect directly to an interstate pipeline. *See id.; see also Kansas Power & Light Co. v. FERC*, 891 F.2d 939, 941-42 (D.C. Cir. 1989) (discussing policy change). As this Court recognized in *General Motors*, 519 U.S. at 306 & n.14, the courts of appeals have approved this change in policy. *See Board of Water, Light, and Sinking Fund Commissioners v. FERC*, 294 F.3d 1317, 1324-27 (11th

Cir. 2002); *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412 (10th Cir. 1992); *Kansas Power, supra*, 891 F.2d 939, and *Michigan Consolidated Gas Co. v. FERC*, 883 F.2d 117, 122-123 (D.C. Cir. 1989).

In sum, through this bypass policy that permits direct head-to-head gas transportation competition between LDCs and interstate pipelines, FERC, with the approval of the courts of appeals, has determined that Congress's pro-competitive natural gas policy in the federal sphere trumps federal deference to the States interest in protecting the monopoly markets of the LDCs. State taxes, like Ohio's, undermine the consumer benefits Congress intended by handicapping one of the principal sources of competitive transportation.

Of particular importance here is state reaction to this permissive federal bypass policy. To minimize the effects of bypassing of LDCs, a number of states have instituted open access programs of their own that permit and in some cases require LDCs to unbundle their gas sales and distribution services to open *both* the small-volume residential and large volume commercial and industrial markets to competition. *See* Energy Information Administration, Dep't of Energy, *Distribution of Natural Gas: The Final Step in the Transmission Process* at 6 (June 2008), available at http://www.eia.doe.gov/pub/oil_gas/natural_gas/featurearticles/2008/ldc2008/ldc2008.pdf. In the period 1994-2006, "at least 23 states introduced customer choice programs intended to benefit small customers." *Id.* at 5. Importantly, most of this evolution has taken place since the Court's 1997 *General Motors* decision.

Given the State of Ohio's decision to expose its LDCs to competition discussed above, the federal

policy articulated in the bypass cases to bring the benefits of a nationwide competitive market to the end consumers served by LDCs, and state action to open up their own LDCs' markets, there is no good reason to apply *General Motors'* special LDC carve out from Commerce Clause jurisprudence.

C. The Decision Below Threatens to Encourage Similar Discriminatory State Tax Legislation.

The Court has acknowledged that the States have an incentive to favor intrastate interests at the expense of interstate interests. *See, e.g., Southern Pac. Co. v. Arizona*, 325 U.S. 761, 767 n.2 (1945) ("to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected"). The federal Constitution's protections against this discrimination, including the Commerce Clause, counterbalance the State's "strong political motives to engage in discriminatory taxation." Richard H. Fallon, Jr. and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1833 n.569 (1991); *see also* David P. Currie, *The Constitution in the Supreme Court*, 37 CATH. U.L. REV. 39, 61 (1987) ("Since geographical outsiders have no vote, they are in special need of constitutional protection. * * * [T]his approach also helps to explain the Court's long-standing insistence that interstate commerce may not be subjected to discriminatory burdens."); Donald H. Regan, *The Supreme Court and State Protectionism*, 84 MICH. L. REV. 1091, 1092 (1986) (describing states' motives for protectionism, and this

Court's concern with "preventing states from engaging in purposeful economic protectionism").

Notwithstanding the substantial precedent in this Court barring such discrimination under the Commerce Clause, many states persist in imposing discriminatory taxes on interstate pipelines. They are easy targets: once an interstate pipeline invests the substantial funds necessary to purchase rights of way and build pipeline facilities in a state, those costs are sunk, and the pipeline has little bargaining power. The problem is not theoretical. Based on a 2008 survey of INGAA members, eight other states currently impose discriminatory state property taxes on interstate pipelines that favor their own parochial interests, effectively subsidizing local companies at the expense of interstate pipelines and their customers. See the Appendix to this brief showing the impact of discriminatory state taxes on interstate pipelines.

Finally, the Ohio Supreme Court's decision has serious potential to distort the national market for the sale of all goods, not just natural gas. Perhaps the most significant aspect of this case lies not in the existence of a plethora of identical or similar property tax schemes in other states, but in its jurisprudential justification for discriminatory state tax schemes that favor in-state commerce to the detriment of interstate commerce. Analogous taxation schemes that favor in-state commerce over interstate commerce have been overturned by this Court in many Commerce Clause decisions. Such decisions leave no room for discrimination, yet state courts persist in attempting to carve out exceptions for their own transgressor statutes. This Court cannot tolerate such a result without permitting the enervation of a critical line of Commerce Clause jurisprudence.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for *certiorari*.

Respectfully submitted,

TODD A. LARD
DOUGLAS L. LINDHOLM
JANA L. MALONE
BOBBY L. BURGNER
J. HUGH MCKINNON
KEITH G. LANDRY
COUNCIL ON STATE TAXATION
122 C St. N.W.
Suite 330
Washington, D.C. 20001
(202) 484-5222

DONALD F. SANTA
JOAN DRESKIN
TIMM ABENDROTH *
DAN REGAN
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA
10 G Street, N.E.
Suite 700
Washington, DC 20002
(202) 216-5912

* Counsel of Record

July 14, 2008

APPENDIX

INGAA STATE TAX DISCRIMINATION SURVEY

(Compiled February 8, 2008)

State	2007 Actual Property Taxes Paid by Interstate Natural Gas Pipelines	Equivalent Property Tax if Assessed the Same as Other State Businesses	Discriminatory Tax Amount
Alabama	$ 14,939,636	$ 9,959,757	$ 4,979,879 [1]
Kansas	$ 45,495,021	$ 33,130,952	$ 12,364,069 [2]
Kentucky	$ 6,881,457	$ 5,032,465	$ 1,848,992 [3]
Louisiana	$ 63,864,376	$ 40,058,046	$ 23,806,330 [4]
Mississippi	$ 35,229,197	$ 17,614,599	$ 17,614,599 [5]
Montana	$ 15,076,597	$ 3,778,752	$ 11,297,845 [6]

cont'd

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[1] Alabama discrimination is based on the difference between a 30% assessment ratio applied to the value of interstate pipeline property versus a 20 % ratio applied to other businesses.

[2] Kansas discrimination is based on the difference between an interstate pipeline ratio of 33% on all property while other business taxpayers are assessed at a 25% ratio.

[3] Kentucky's discriminatory tax is based on "4-R" tangible State tax rate of .2403 (pipelines at .45) and a local personal property assessment multiplier of 56% (pipelines at 100%).

[4] Louisiana discrimination is based on the difference between the pipeline ratio of 25% and an assessment ration of 15% applied to other businesses.

[5] Mississippi discrimination is based on the difference between the pipeline ratio of 30% and other businesses at a ratio of 15%.

[6] The Montana tax rate currently applicable to pipelines (class 9) is 12%. The tax rate for other businesses (commercial and industrial) currently is 3%.

Ohio	$ 43,148,570	$ 12,438,783	$ 30,709,787 [7]
Oklahoma	$ 14,967,796	$ 8,328,931	$ 6,638,865 [8]
Tennessee	$ 8,245,493	$ 4,663,050	$ 3,582,443 [9]
Totals	**$ 247,848,143**	**$ 135,005,335**	**$ 112,842,808**

[7] As discussed in the brief, Ohio discrimination is based on the difference between the 88% assessment ratio for interstate pipelines and the 25% ratio applicable to LDCs and others.

[8] Oklahoma discrimination is based on the difference between the pipeline ratio of 22.85% and 12.5% applicable to other businesses.

[9] Tennessee discrimination is based on the difference between the pipeline assessment ratio of 55% (all property) and the Commercial and Industrial assessment ratio of 40% for real property and 30% for personal property.

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No. 07-1554

IN THE

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COLUMBIA GAS TRANSMISSION CORPORATION,

Petitioner,

v.

RICHARD A. LEVIN
TAX COMMISSIONER OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Ohio Supreme Court

BRIEF OF SPECTRA ENERGY CORP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JEROME B. LIBIN*
** Counsel of Record*
ERIC S. TRESH
JEFFREY A. FRIEDMAN
MARIA M. TODOROVA

SUTHERLAND ASBILL
& BRENNAN LLP
1275 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20004
(202) 383-0100

Counsel for *Amicus Curiae*
Spectra Energy Corp

July 14, 2008

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v.

RICHARD A. LEVIN
TAX COMMISSIONER OF OHIO,

Respondent.

On Petition for a Writ of Certiorari to the Ohio Supreme Court

BRIEF OF SPECTRA ENERGY CORP AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

Spectra Energy Corp ("Spectra") is a Delaware corporation with its headquarters in Houston, Texas.

[1] Counsel of record for both parties received timely notice of the intention of *amicus curiae* to file this brief and both parties consented to the filing through blanket consents on file with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

Spectra is one of North America's leading natural gas infrastructure companies. It is engaged through various subsidiaries and equity affiliates in the transmission, storage, distribution, gathering and processing of natural gas. Prior to 2007, Spectra was a unit of Duke Energy Corporation.

Spectra's United States pipeline system consists of more than 13,500 miles of transmission pipelines, with five primary transmission systems. One of its systems is Texas Eastern Transmission, LP ("Texas Eastern"). The Texas Eastern system has close to 9,000 miles of pipeline connecting Texas and the Gulf Coast with the northeastern United States. A significant portion of the Texas Eastern system runs through Ohio, where Texas Eastern transports gas from the Gulf Region to industrial users, power plants, municipalities and other customers in that State. In providing that service, Texas Eastern is in direct competition with local distribution companies ("LDCs"), which are public utilities based in Ohio and which, since 1997, have been authorized by the State to sell their own gas transportation service as an "unbundled" service to any and all local and out-of-state producers and marketers seeking to have gas delivered to customers in Ohio.

Spectra's Texas Eastern pipeline property is subject to Ohio personal property tax at 88 percent of the property's true value, while the LDCs' pipeline property is subject to tax at 25 percent of true value. Spectra's operations in Ohio will be directly affected by the outcome of the instant case.

SUMMARY OF ARGUMENT

Following Ohio's deregulation of the natural gas industry beginning in 1997, LDCs were authorized for the first time to provide gas transportation, storage and gathering services to customers in direct competition with interstate pipeline companies doing business in the State. In addition, the LDCs lost their monopoly power over the local residential customer market for "bundled" gas purchases, as residents were allowed to purchase "unbundled" gas from any in-state or out-of-state supplier. LDCs thus now compete in the Ohio natural gas market in many ways not previously contemplated.

Notwithstanding these changes in the industry, the court below refused to find a constitutional violation in the State's taxing scheme for pipeline property used to transport natural gas, which provides a substantial benefit to the LDCs. The court concluded that the rationale of this Court's decision in *General Motors Corp.* v. *Tracy*, 519 U.S. 273 (1997), justified a conclusion that the LDCs and the interstate pipeline companies were not "substantially similar" enterprises for purposes of testing the constitutionality of the differential taxation in question. What the court below overlooked was that Ohio's actions in deregulating the natural gas industry after the decision in *GM* v. *Tracy* not only completely altered the marketplace but also the very foundation upon which this Court's decision had rested.

Because the LDCs no longer sell "bundled" gas to a "captive" residential market, a role that this

Court saw as their primary mission at the time *GM* v. *Tracy* was considered, the LDCs have lost the cloak that shielded them from claims of unconstitutional protectionism. Instead, for dormant Commerce Clause purposes, deregulation has necessarily caused the LDCs to become "substantially similar" to all other participants in the markets in which they now compete. Accordingly, allowing the LDCs to enjoy a significantly reduced tax burden on their personal property while taxing the property of their interstate pipeline competitors much more heavily represents impermissible economic protectionism.

This Court should review the instant case to reinforce its long line of precedent establishing that the dormant Commerce Clause does not condone a State taxing scheme that so blatantly favors local interests over out-of-state interests competing in the same marketplace. Additionally, this Court should review the decision below to provide very clear guidance to the States on what types of protectionist measures do not pass constitutional muster in the context of an industry moving from regulation to deregulation.

ARGUMENT

The instant case raises an important and quite fundamental constitutional question – under what circumstances will a state's deregulation of a public utility industry cause previously dissimilar enterprises to become "substantially similar" for purposes of testing impermissible discrimination against out-of-state participants in the deregulated marketplace.

In *GM* v. *Tracy*, this Court considered a challenge to the sales/use tax exemption that Ohio allowed for sales of natural gas by LDCs, but not for sales by out-of-state producers or marketers. This Court held that the differential tax treatment accorded such sales did not constitute impermissible discrimination against the out-of-state sellers in violation of the dormant Commerce Clause. The basis for that decision was that the LDCs and the out-of-state sellers were not "substantially similar" enterprises, as required to permit a valid comparison for purposes of testing a claim of unconstitutional discrimination. 519 U.S. at 298-300. Following its decision in *GM* v. *Tracy*, this Court has continued to recognize the principle that "any notion of discrimination assumes a comparison of substantially similar entities." *United Haulers Ass'n, Inc.* v. *Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1795 (Apr. 30, 2007).

The underlying rationale for distinguishing LDCs from out-of-state sellers in *GM* v. *Tracy* was that, under the then-existing Ohio regulatory framework, the primary role of the LDCs was to sell "bundled" gas to a "captive" market of local residential customers. During the tax periods at issue, the transportation of gas to residential customers was a service embedded in the charge for the gas. In addition, the LDCs had certain other obligations and responsibilities to residential customers that were imposed on them in exchange for the monopoly privilege they were granted. The LDCs were also authorized to sell "unbundled" gas to industrial and commercial users in Ohio, where they competed with out-of-state producers and marketers seeking to sell to the same customers. This Court

viewed the "unbundled" sales activity of the LDCs as merely a supplement to their primary activity, which was to sell "bundled" gas in the "captive" residential market. Since the out-of-state sellers did not compete in the captive residential market, there was not sufficient competition between the two selling groups to support a determination of impermissible discrimination in Ohio's taxing scheme.

This Court went on to note that the Ohio statutes contained numerous other differences in tax treatment affecting the various market participants (LDCs, pipelines, producers and marketers) active in the State. *GM* v. *Tracy*, 519 U.S. at 307, 308. For example, at that time LDCs paid personal property tax on 88 percent of true value, while nonregulated gas marketers paid personal property tax on 25 percent of true value. *Id.* at 308 n.16. This Court anticipated that future challenges to such differential treatment would be forthcoming. *Id.* What this Court may not have anticipated was that Ohio would dramatically change its regulatory framework almost contemporaneously with this Court's decision in *GM* v. *Tracy*.

As a result of Ohio's actions in deregulating the natural gas business, LDCs have been free to engage, in an "unbundled" manner, in the business of transporting natural gas within the State. LDCs with adequate pipeline capacity of their own now offer a wholly separate gas transportation service to both in-state and out-of-state producers and marketers seeking to have their gas delivered to customers in Ohio. LDCs are also free to sell unbundled natural gas storage and gathering services. In offering all of these services, the LDCs

now compete head-to-head with the interstate pipeline companies, including petitioner and Spectra, that offer the same services to Ohio customers.

While the LDCs continue to sell gas to local residential customers, deregulation introduced "customer choice" in Ohio. Residential customers are now free to select among various gas suppliers. Delivery of the gas they purchase is now provided as a separate "unbundled" service by the customer's LDC. Thus, while the LDCs as a group still have a captive *distribution* market (because the interstate pipelines have not attempted to deliver gas to local residential customers), the LDCs no longer have a captive *sales* market for their gas. Residential customers can choose to purchase their gas from a different in-state or out-of-state supplier and arrange for their LDC merely to deliver the gas.

Ohio's deregulation of the natural gas industry has completely altered the marketplace and, as a result, the foundation upon which *GM* v. *Tracy* rested. Although the LDCs continue to have certain obligations to support the local residential market in various worst-case scenarios, they no longer have as their primary mission the sale of "bundled" gas to a "captive" local market. They now compete with other suppliers for local residential sales as well as for industrial and commercial sales.

Given these changes, there is no basis for concluding, as did the court below, that the mere continuation of sales of gas by LDCs into the local residential market, now on a competitive, unbundled basis under a "customer choice" regime, should serve

to immunize from constitutional challenge any preferential benefits that have been accorded the LDCs in the deregulated environment. The rationale that led to the result reached in *GM* v. *Tracy* should not control the outcome here because the activities of the LDCs in the marketplace have completely changed.

As this Court made clear in *GM* v. *Tracy*, the role of the dormant Commerce Clause is to protect markets and participants in markets. 519 U.S. at 300. The LDCs and the interstate pipeline companies now compete directly in the market for providing gas transportation services and certain other services in Ohio. Deregulation of the natural gas industry in Ohio has thus produced "substantial similarity" between the LDCs and the interstate pipeline companies with respect to the offering of such services. Indeed, the Ohio regulators have endeavored to create what is, from a non-tax perspective, essentially a level playing field for the provision of such services.

In the course of deregulating the LDCs, however, Ohio also saw fit to provide them with a generous tax break. Effective with the tax year 2001, Ohio reduced the assessment ratio on LDC personal property (including pipelines and related equipment) from 88 percent of true value to 25 percent of true value. At the same time, it left the assessment ratio for the personal property of the pipeline companies at 88 percent of true value. As a result, the property of the interstate pipeline companies is now taxed more than three times as heavily as the property of the LDCs. This directly affects the competitiveness of the interstate

pipelines as they offer their services to Ohio customers.

Ohio's action in reducing the tax assessment ratio for LDC pipeline property, while leaving the interstate pipeline property tax ratio intact, represents a blatant form of economic protectionism that runs directly afoul of the dormant Commerce Clause. The State's action is equivalent to the imposition of an entry fee on interstate pipelines equal to the tax on 63 percent (*i.e.*, the difference between 88 percent and 25 percent) of the true value of their Ohio-based property. It is hard to imagine a more obvious form of intentional and facial discrimination that burdens interstate commerce in favor of purely local interests. *New Energy Co.* v. *Limbach*, 486 U.S. 269 (1988); *Chemical Waste Mgmt., Inc.* v. *Hunt*, 504 U.S 334 (1992); *Camps Newfound/Owatonna* v. *Town of Harrison*, 520 U.S. 564 (1997).

As noted above, the deregulation fostered by Ohio necessarily produces "substantial similarity" between the LDCs and the interstate pipeline companies with respect to the offering of gas transportation, storage and gathering services. The decision of the court below is thus in direct conflict with numerous decisions of this Court that have invalidated taxing schemes favoring local interests over competing out-of-state interests. *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984); *New Energy Co.* v. *Limbach*, 486 U.S. 269 (1988). This Court should review the instant case to make it clear to lower courts that a State's shift from regulation to deregulation of an industry such as the natural gas industry provides a natural environment in which

newly-emerging competitors can be found to satisfy the "substantially similar" requirement that supports a discrimination challenge.

This Court should also review the decision below to establish the permissible limits for a State's use of its regulatory apron strings to shield the granting of economic benefits to local interests as part of the deregulation process, to the detriment of interstate competitors participating in the marketplace. Without further guidance from this Court, States will assume they are free to continue enacting protectionist measures that favor local market participants, notwithstanding a stated goal of free and open competition with out-of-state interests.

This Court's review of the decision below is particularly important at this time, in light of the increasing trend toward the deregulation of public utility services across the country.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME B. LIBIN*
*Counsel of Record
ERIC S. TRESH
JEFFREY A. FRIEDMAN
MARIA M. TODOROVA

SUTHERLAND ASBILL
& BRENNAN LLP
1275 PENNSYLVANIA AVE., NW
WASHINGTON, DC 20004
(202) 383-0100

Counsel for *Amicus Curiae*
Spectra Energy Corp

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